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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

WILLIAM H. WALKER, JR.,
Petitioner,

v.

THOMAS BAIN, Guard; JANICE METZGER,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Court of Appeals for the Sixth Circuit reversed the ruling of the district court which held that 42 U.S.C. § 1997e(d)(2) of the Prison Litigation Reform Act is unconstitutional under the equal protection component of the Fifth Amendment of the United States Constitution.[1]

This case raises the following two questions that warrant review by this Court:

(1) Whether § 1997e(d)(2) of the Prison Litigation Reform Act violates the Equal Protection Component of the Fifth Amendment of the United States Constitution by capping the maximum attorney fee award that prisoners may recover in civil rights actions, while leaving all other civil rights plaintiffs free to recover reasonable attorney fees under 42 U.S.C. § 1988.

(2) Whether the rules of statutory construction under applicable precedent from this Court renders § 1997e(d)(2) of the Prison Litigation Reform Act inapplicable to this case.

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[1] The Sixth Circuit has also reversed two other district court decisions that held that § 1997e(d)(2) is unconstitutional. *See Wolff v. Moore*, 104 F.Supp.2d 892 (S.D. Ohio 2000), *vacated*, 234 F.3d 1271 (6th Cir. 2000); *McLindon v. Russell*, No. C-1-95-676, 2000 WL 1221854 (S.D. Ohio, June 15, 2000), *rev'd and vacated*, 19 Fed. Appx. 349, 2001 WL 1136073 (Sept. 19, 2001).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William H. Walker, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a – 33a) is reported at 257 F.3d 660. The opinion of the district court (App., *infra*, 34a – 66a) is reported at 65 F.Supp.2d 591.

JURISDICTION

The court of appeals entered its judgment on July 20, 2001. The court of appeals denied a timely petition for rehearing on November 5, 2001 (App., *infra*, 67a).

This Petition for Writ of Certiorari is filed within 90 days of the court of appeals' November 5, 2001, order. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provision of the Prison Litigation Reform Act at issue, 42 U.S.C. § 1997e(d)(2), provides, in relevant part, as follows:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under *[42 U.S.C. § 1988]*, such fees shall not be awarded, except to the extent that
>
> > (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to

> which a fee may be awarded under [*42 U.S.C. § 1988]*; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel

42 U.S.C. § 1988(b) provides, in relevant part as follows:

> in any action or proceeding to enforce a provision of section [] ... 1983 ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case involves the constitutionality of a federal statutory provision that imposes restrictions on *prisoners'* recovery of attorney fee awards when they prevail in civil rights litigation, but that does not impose similar restrictions on *any other class of prevailing civil rights litigants*. Prior to 1996, all plaintiffs who prevailed in certain civil rights actions, including prisoners, were entitled to recover their "reasonable" attorney fees under 42 U.S.C. § 1988. In 1996, Congress took away prisoners' right to receive attorney fees under § 1988 on the same terms as other civil rights litigants through the enactment of the Prison Litigation Reform Act ("PLRA"). The PLRA provision at issue in this case, 42 U.S.C. §1997e(d)(2), *severely* restricts the amount of attorney fees that courts can award prevailing prisoners who recover monetary relief in civil rights actions by (1) limiting such attorney fee awards to 150% of the judgment; and (2) requiring prisoners to contribute up to 25% of the judgment to satisfy the attorney fee award. These limitations have and will continue to result in miniscule attorney fee awards in many successfully prosecuted prisoner civil rights cases.[1]

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[1] The effect of the restrictions can be illustrated as follows: a civil rights litigant who reasonably incurs $20,000 in attorney fees to successfully prosecute a civil rights action that results in a monetary judgment for $2,000 is entitled to an attorney fee award of up to *$20,000* if the litigant is not a prisoner, but less than *$3,500* if the litigant is a prisoner.

Petitioner Walker seeks this Court's intervention to determine whether the attorney fee limitations imposed by §1997e(d)(2) violate the Equal Protection component of the Fifth Amendment of the United States Constitution by singling out prisoners and treating them differently than nonprisoners with respect to the recovery of attorney fees under 42 U.S.C. § 1988.

I. The Underlying Litigation

Petitioner Walker, an inmate at Standish Maximum Correctional Facility in Michigan, filed a *pro se* Complaint against Thomas Bain and Janice Metzger in May 1995 in the United States District Court for the Eastern District of Michigan. He alleged that Bain and Metzger retaliated against him for exercising his First Amendment right to file grievances and lawsuits against corrections officers. The jurisdiction of the district court was invoked under 42 U.S.C. § 1983 and under 28 U.S.C. § 1331 (general federal question jurisdiction).

Walker began filing motions in September 1995 for the appointment of counsel. The district court denied his initial motions. After Walker survived Respondents' initial flurry of dispositive motions (a motion to dismiss and summary judgment motion), the district court appointed the undersigned to represent Walker. Ultimately, Respondents filed a total of *four* dispositive motions prior to the trial and Petitioner Walker successfully defended against all of them with respect to his retaliation claims.

This case was tried to a jury before Magistrate Judge Paul J. Komives pursuant to 28 U.S.C. § 636(c). After a five day trial, the jury returned a verdict in Petitioner Walker's favor and assessed $425 in punitive damages against Respondents. As the prevailing party, Walker moved for an award of attorney fees. Because he was a prisoner, 42 U.S.C. § 1997e(d)(2) of the PLRA limited the maximum amount of reasonable attorney fees that Walker could recover to less than $638. The district court agreed with Petitioner Walker, however, that §1997e(d)(2) violates the Equal Protection

component of the Fifth Amendment by treating prisoners differently than other prevailing civil rights litigants. In a split 2 to 1 decision, the court of appeals reversed, while acknowledging that "§1997e(d)(2) will have a strong chilling effect upon counsels' willingness to represent prisoners who have meritorious claims" and that §1997e(d)(2) "ha[s] a disparate impact on suspect classes and on individuals exercising fundamental rights." App., *infra*, 13a and 20a n.3.

II. The District Court's Decision

In holding that § 1997e(d)(2) of the PLRA is unconstitutional under rational basis scrutiny, the district court reasoned that § 1997e(d)(2) does not rationally further the legitimate governmental interests of deterring frivolous prisoner lawsuits and protecting the public fisc. First, relying upon this Court's decisions in *Lindsey v. Normet*, 405 U.S. 56 (1972) and *Rinaldi v. Yeager*, 384 U.S. 305 (1966), the district court determined that § 1997e(d)(2) is not rationally related to deterring frivolous lawsuits, in part, because § 1997e(d)(2) targets *only* successful prisoner civil rights claims. App., *infra*, 57a-61a. The district court correctly reasoned that a prisoner can obtain a fee award under § 1988 only if he prevails on his claim. Therefore, the only prisoners who are affected by §1997e(d)(2)'s restrictions are those prisoners whose claims are meritorious, *i.e.*, non-frivolous. App., *infra*, 57a-58a.

Second, the district court reasoned that § 1997e(d)(2) is not rationally related to the goal of protecting the public fisc because there is no rational reason to distinguish between prevailing prisoner and nonprisoner civil rights litigants for the purpose of protecting the public fisc. Such a distinction amounts to arbitrary discrimination that "is not a permissible means of guarding the state's purse." App., *infra*, 58a-61a.

Finally, the district court rejected Respondents' contention that prisoner and nonprisoner civil rights litigants are not similarly situated. App., *infra*, 37a-40a. Among other reasons, the district court determined that the proper inquiry

is whether *successful* prisoner civil rights litigants are similarly situated with successful nonprisoner civil rights litigants. *Id.* Based upon this inquiry, the district court determined that the distinction drawn by §1997e(d)(2) does not rationally relate to a prisoner's increased incentive or ability to file a frivolous lawsuit. *Id.*

Based on its determination that §1997e(d)(2) is unconstitutional, the district court employed the multifactored analysis that applied to all civil rights litigants' claims prior to the enactment of the PLRA to determine whether, and in what amount, to award Walker in attorney fees. In short, the district court granted Walker's motion for attorney fees, in part, and ordered Respondents to pay his reasonable attorney fees in the amount of $34,493.72. Respondents appealed the district court's decision with respect to the attorney fee award.

III. The Decision Of The Court of Appeals

After Respondents appealed the district court's holding, but before this case was submitted to a panel of the court of appeals for oral argument, the court of appeals issued its 2 to 1 split decision in *Hadix v. Johnson*, 230 F.3d 840 (6th Cir. 2000). The *Hadix* decision is important because the court of appeals in the instant case primarily relied upon it in reaching its holding that § 1997e(d)(2) is constitutional.

1. The *Hadix* decision

The *Hadix* court dealt only with a challenge to the constitutionality of § 1997e(d)(3), and specifically excluded from consideration the issue of the constitutionality of § 1997e(d)(2). *Hadix*, 230 F.3d at 842 n.1. The provision at issue in *Hadix*, § 1997e(d)(3), caps the hourly rate on which an award of attorney fees can be based when a prisoner prevails in a civil rights action. The majority in *Hadix* concluded that § 1997e(d)(3) is rationally related to the goal of decreasing what it termed "marginal or trivial" lawsuits. *Id.* at 845. In so holding, the Court reasoned that attorneys

will be discouraged from attempting to prevail on a "technical" claim in order to "assur[e] the recovery of attorneys fees." *Id.* By purportedly reducing "marginal or trivial" claims, the *Hadix* majority further held that the hourly fee cap is rationally related to the legitimate goal of protecting the state and federal treasuries from such claims. *Id.*

Significantly, Judge Nathaniel Jones dissented from the majority's holding in *Hadix*. Judge Jones concluded that § 1997e(d)(3) is not rationally related to the goal of decreasing marginal or trivial lawsuits or any other governmental interest. *Id.* at 847-48. In reaching his decision, Judge Jones cited, with approval, the district court's decision at issue in the instant appeal.

2. The Court of Appeals' Decision In The Instant Case

In this case, the majority of the court of appeals panel concluded that the same arguments that were accepted by the majority in *Hadix* in support of the constitutionality of § 1997e(d)(3) hold true with respect to § 1997e(d)(2) as well. App., *infra*, 12a. That is, the majority concluded that § 1997e(d)(2) is rationally related to the goals of reducing "marginal or trivial" claims and protecting the public treasuries from such claims. App., *infra*, 12a-13a. The panel majority reached this conclusion despite recognizing that *Hadix expressly* declined to address the issue of the constitutionality of § 1997e(d)(2). Further, the panel majority reached this conclusion notwithstanding its stated awareness that "§ 1997e(d)(2) will have a strong chilling effect upon counsels willingness to represent prisoners who have meritorious claims" and that § 1997e(d)(2) "ha[s] a disparate impact on suspect classes and on individuals exercising fundamental rights." App., *infra*, 13a and 20a n.3.

Judge Martha Craig Daughtrey dissented from the majority's holding. In her dissent, Judge Daughtrey summarized the court of appeals' decision as follows:

> Today, we take the additional step of holding that prisoners, and persons attempting to assist them, are less worthy of basic constitutional protections than are unincarcerated civil rights litigants. In order to register my protest to this unfortunate ruling, I respectfully dissent from the majority's holding ...

App., *infra*, 23a.

Judge Daughtrey applied the rational basis test to each of the purported governmental interests underlying §1997e(d)(2) and concluded that none of them satisfied the test. Significantly, Judge Daughtrey addressed the two goals cited by the majority in support of its decision. First, in concluding that the alleged governmental interest of deterring "trivial or inconsequential suits" is not a legitimate governmental interest, Judge Daughtrey reasoned:

> it is puzzling that the defendants and governmental intervenors can unabashedly term any vindication of constitutional rights "trivial" or "insignificant." To do so denigrates the sacrifices of millions of American men and women who have struggled and died, both at home and abroad, to protect the very freedoms guaranteed by our constitution. Second the amount of a monetary damage award should not be equated with the significance of the rights secured or protected in any legal action.

App., *infra*, 26a. Judge Daughtrey further concluded that the governmental interest in deterring "trivial" suits is not rationally furthered through § 1997e(d)(2), in part, because almost all prisoner rights cases are filed *pro se*, *pro bono*, or by dedicated public interest organizations whose representation decisions are not driven by the possibility of personal pecuniary gain. App., *infra*, 26a-27a.

With respect to governmental interest of protecting the public fisc, Judge Daughtrey agreed with the district court that this interest can not lawfully be carried out "by arbitrarily singling out a particular class of persons to bear the entire burden of achieving that end."

REASONS FOR GRANTING THE PETITION

The issue presented in this case is of utmost importance. The rationales underlying and the practical effect of § 1997e(d)(2) impinge upon many of the principles that are central to the core beliefs and values of this country – access to courts, the availability of legal counsel, and the right to be free of arbitrary and irrational discriminatory treatment. This case is a timely and rare opportunity to provide guidance on the bounds of the rational basis test, to confirm that it is not a rubber stamp of all legislative action, and to reconfirm that the Constitution of the United States of America mandates that *everyone* be free of governmental legislation that is arbitrary, discriminatory or otherwise serves no legitimate governmental interest.

I. Review Is Warranted In This Case Because The Court Of Appeals' Decision Conflicts With Applicable Decisions Of This Court.

Review should be granted in this case because the court of appeals' decision is in conflict with applicable decisions of this Court. Through a misapplication of the rational basis test, the court of appeals determined that § 1997e(d)(2) is constitutional. Specifically, the court of appeals determined that § 1997e(d)(2) is rationally related to the following governmental objectives: (1) protecting the public fisc and (2) decreasing "marginal or trivial" claims – the same governmental objectives that it found supported the constitutionality of a separate and distinct PLRA provision, § 1997e(d)(3), in *Hadix v. Johnson*, *supra*. The court of appeals' holding conflicts with and is erroneous under relevant decisions from this Court.

As an initial matter, the court of appeals erred in applying the rational basis test to § 1997e(d)(2) based on its holding that § 1997e(d)(2) "ha[s] a disparate impact on suspect classes and on individuals exercising fundamental rights." App., *infra*, 13a and 20a n.3. Because § 1997e(d)(2) has a disparate impact on suspect classes, strict scrutiny should be applied to determine whether § 1997e(d)(2) is constitutional. At the very least, intermediate scrutiny should be applied. *See e.g.*, *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995).

Assuming, *arguendo*, that the court of appeals and the district court below applied the appropriate level of scrutiny in analyzing whether § 1997e(d)(2) is constitutional, under the rational basis test a law is valid only if it rationally furthers a *legitimate* governmental interest. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Thus, a law will fail under rational basis review if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [legislature's] actions were irrational." *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991) (internal quotations and citations omitted).

This Court provided the standard for analyzing equal protection challenges under the rational basis test in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985):

> To withstand equal protection review legislation that distinguishes between [one group] and others must be rationally related to a legitimate governmental purpose ... The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives – such as a bare ... desire to harm a potentially unpopular group – are not legitimate state interests.

Id. (citations omitted) (invalidating a local zoning ordinance requiring a special use permit for homes for the mentally

retarded for lack of any rational basis in record for believing that group home would threaten legitimate state interests).

For the reasons set forth below, the governmental objectives cited by the court of appeals and courts of appeals in sister circuits fail to survive rational basis scrutiny under applicable decisions from this Court. Because authority from lower appellate courts conflict with decisions from this Court, this petition should be granted.

A. Protecting the Public Fisc.

The court of appeals' holding that § 1997e(d)(2) is rationally related to the governmental interest of protecting the public fisc conflicts with applicable decisions from this Court. To be sure, a law which has the effect of extinguishing prisoner civil rights suits, including those with merit, would reduce the administrative burden on the federal courts and lower the cost to states and municipalities of violating the civil rights of their prisoners. Congress' possible interest in the fiscal well-being of state and federal taxpayers is not materially advanced, however, by relieving errant governmental actors of responsibility for a portion of the plaintiff's legal fees in the few cases in which liability for monetary damages is established. Moreover, the state's interest in protecting its treasury from attorney fee awards is not materially advanced because prisoner civil rights claims under 42 U.S.C. §1983 are asserted against governmental actors in their *individual* capacity.[2] *See* 42 U.S.C. § 1983.

In any event, invoking the interest of conserving public resources as a justification for restricting the benefits payable to one class of persons merely states the classification without explaining it. In *Plyler v. Doe*, 457 U.S. 202, 227 (1982), this Court rejected the state's argument that

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[2] Indeed, in the State of Michigan, the Michigan Department of Corrections has a specific policy against indemnifying governmental actors where their conduct results in an award of punitive damages.

denying a public education to the undocumented children of illegal aliens was rational because it saved money for the education of others. In so holding, this Court reasoned:

> Appellants argue that the classification ... furthers an interest in the 'preservation of the state's limited resources for the education of its lawful residents.' Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. The state must do more than justify its classification with a concise expression of an intention to discriminate.

Id. (citations and footnotes omitted).

Similarly, the proponents of the constitutionality of § 1997e(d)(2) must offer more as a justification for carving out successful prisoner claims from the orbit of § 1988 than the interest in conserving the state's resources. Such an interest would be advanced by abrogating or abridging fee shifting in all civil rights cases, not by fastening the burden of conserving resources solely on prevailing prisoner civil rights litigants.

Moreover, the argument that § 1997e(d)(2) is rationally related to the governmental interest of protecting the federal and state treasuries conflicts with this Court's decision in *Rinaldi v. Yeager*, 384 U.S. 305 (1966), one of two 1966 Supreme Court opinions that invalidated under the equal protection clause, state laws that discriminated against prisoners without any penological or other justification.[3] At issue in *Rinaldi* was the constitutionality of a New Jersey law that required indigent prisoners who appealed unsuccessfully

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[3] The other 1966 case was *Baxstrom v. Herold*, 383 U.S. 107 (1966). In *Baxstrom*, the Court found no legitimate justification for a state law depriving a prisoner of a sanity hearing which is a pre-condition to the commitment of non-prisoners in a mental institution.

from their convictions to reimburse the county for the cost of the trial transcript out of their prison earnings. The reimbursement requirement did not apply to criminal defendants who appealed unsuccessfully from non-custodial sentences such as a suspended sentence, fine or probation. The state proffered as the justification for the law its fiscal interest in obtaining repayment for the cost of the transcripts.

This Court struck down the repayment law that discriminated against prisoners, holding that "by fasten[ing] a financial burden only upon those unsuccessful appellants who are confined," the state had made "an invidious discrimination." *Rinaldi*, 384 U.S. at 309. What made the state's classification between incarcerated and non-incarcerated convicted criminals an invidious one was that the classification was irrelevant to the declared purpose of the law. "There is no defensible interest served by focusing on that distinction [between confinement and non-confinement] as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision." *Id.* Nor did it matter that there was a plausible correlation between the defendant's prior record and the likelihood of a sentence to imprisonment. As the cost to the state of providing a trial transcript was the same regardless of the appellant's prior criminal record, that trait, too, was simply "unrelated to the fiscal objective of the statute." *Id.*

The only analytical difference between the repayment statute in *Rinaldi* and the PLRA attorney fees restrictions is that the former involved the imposition of a burden unequally while the latter attempts the unequal distribution of a benefit. They are alike in transgressing the "requirement of some rationality in the nature of the class singled out." *Id.* at 308-09.

Rinaldi was reaffirmed and applied unanimously by this Court in *James v. Strange*, 407 U.S. 128 (1972). *James* invalidated on equal protection grounds a Kansas recoupment statute which obligated indigent criminal defendants to repay the state for the cost of appointed counsel, while depriving them of the same protections against

wage garnishment that were available to all other debtors under state law. The state's legitimate interest in collecting from its debtors, and thereby conserving public funds, did not justify singling out one class of debtors – indigent criminals – for less favorable treatment under the recoupment law. *Id.* at 141-42.

The holding of the court of appeals that § 1997e(d)(2) is rationally related to protecting the public fisc conflicts with this Court's decisions in *Rinaldi*, *James*, and others (*see* discussion of *Lindsey v. Normet*, 405 U.S. 56 (1972), *infra*). For this reason, review of this case by this Court is warranted.

B. The Deterrence Of Marginal Or Trivial Claims

The other possible governmental objective underlying § 1997e(d)(2) cited by the court of appeals in this case and by courts of appeals in sister circuits[4] is the deterrence of meritorious prisoner civil rights claims that are "marginal," "inconsequential," or "trivial." In propounding this possible objective, the courts of appeals theorize that Congress could have determined that, prior to the PLRA, attorneys filed "marginal" claims in the hopes of succeeding and obtaining a substantial fee award under 42 U.S.C. § 1988. Congress could have further determined in enacting § 1997e(d)(2), according to the courts of appeals, that by limiting attorney fees in cases where prisoners' recovery at trial is meager, attorneys will be dissuaded from filing "marginal" claims. The purported governmental objective, therefore, equates the amount of damages awarded on a civil rights claim as the sole indicator of the substantiality of the claim. Precedent from this Court, however, establishes that such a premise is not "legitimate" within the meaning of the rational basis test and thus, cannot support the constitutionality of § 1997e(d)(2).

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[4] *See Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000); *Foulk v. Charrier*, 262 F.3d 687 (8th Cir. 2001).

As an initial matter, in citing the deterrence of marginal or trivial civil rights claims as a possible governmental objective, the court of appeals assumed without explanation that meritorious, but "marginal" civil rights and constitutional claims exist. *They do not* – and the courts of appeals that have made the assumption that they do have not bothered to define what a meritorious, but "marginal" claim is.

Moreover, in holding that deterring marginal or trivial claims is a legitimate governmental interest, the court of appeals sanctioned the assumption underlying § 1997e(d)(2) that the size of a damage award is the proper measure of how valuable a meritorious civil rights claim is. It is this premise that runs afoul of the Constitution and precedent from this Court. *See City of Riverside v. Rivera*, 477 U.S. 561 (1986).

While this Court in *City of Riverside* addressed the issue of whether Congress had intended § 1988 to include a proportionality requirement, this Court's reasoning about the assumptions underlying the proportionality requirement is relevant to the issues presented here. In particular, *City of Riverside* is relevant to the constitutional question of whether the substantiality of civil rights claims can be determined solely by reference to the amount of damages awarded in connection with them.

In *City of Riverside*, this Court rejected the notion that the size of a damage award reflects the substantiality of a claim. This Court held that while the amount of damages a plaintiff had recovered was an appropriate factor to be considered by a court when calculating a fee award under § 1988, it is not the sole or decisive factor. Indeed, this Court rejected the idea that the amount of damages necessarily reflects the full value of a constitutional or civil right. In so holding, this Court reasoned:

> As an initial matter, we reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to

> vindicate important civil and constitutional rights that *cannot be valued solely in monetary terms* ... Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.

Id. at 574 (emphasis added). In highlighting the "social benefits" to the public in the vindication of civil rights, this Court recognized the inherent value to society of enforcing, rather than ignoring, the Constitution and civil rights laws.

Similarly, Judge Daughtrey, in her dissenting opinion in this case, correctly recognized that damage awards do not necessarily reflect the substantiality of civil rights claims. She correctly reasoned:

> The amount of a monetary damage award should not be equated with the significance of the rights secured or protected in any legal action. I am confident that even the majority would not confine the value of liberties such as a woman's right to vote or an African-American's right to sit at a lunch counter to some economic calculation. Similarly, for example, it would not be at all surprising in a prison setting that the value to an inmate of a prospective court ruling forbidding guards from beating him in retaliation for filing a successful grievance would far outweigh any minimal or nominal monetary amount associated with such a judicial order.

App., *infra*, 26a.

The point here is that the vindication of civil rights claims often yields inestimable benefits, both for the aggrieved individuals and for the public. Thus, because of the nonpecuniary nature of civil rights claims, any asserted governmental interest in curtailing them fails to meet the threshold requirement of legitimacy.

Even if deterring marginal claims is a legitimate governmental objective, the distinction drawn by the PLRA between successful, but "marginal" prisoner civil rights claims and successful, but "marginal" nonprisoner civil rights claims is irrational and thus, unconstitutional. There is simply no basis under the Constitution or decisions of this Court to suggest that prisoners' "marginal" civil rights claims are less important than nonprisoners' marginal civil rights claims. Where, for example, a jury awards a prisoner $500 in connection with a public official's violation of his constitutional rights, such an award is of no less value than a jury that awards a nonprisoner $500 in connection with a public official's violation of his constitutional rights.

Simply put, there is no rational basis to provide prisoners with a lesser attorney fee award than nonprisoners for the successful prosecution of a similarly "marginal" claim under 42 U.S.C. § 1988. Limiting attorney fees only in prisoner civil rights cases amounts to nothing more than arbitrary discrimination, which this Court has concluded is unconstitutional. *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973) (dislike of "hippies" could not justify amendment of Food Stamp Act which rendered ineligible for government benefit households containing an individual unrelated to any other member of the household); *see* also *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975) (holding that "a bare congressional desire to harm an unpopular group" is not a legitimate state interest).

Congress could, we may suppose, repeal section 1988 and do away with the fee shifting in civil rights actions entirely without offending the Constitution. Having chosen to confer the benefit to prevailing plaintiffs, however, Congress may not arbitrarily deny the benefit to a particular group based on a trait that is unrelated to the purpose of the denial.

C. Section 1997e(D)(2) Is Not Rationally Related To Any Other Conceivable Governmental Interest.

As set forth above, the two governmental objectives cited by the court of appeals in reaching its decision do not support the constitutionality of § 1997e(d)(2). In the proceedings below, Respondents set forth three other purported governmental interests underlying § 1997e(d)(2): (1) deterring the filing of frivolous prisoner civil rights claims; (2) reducing judicial intervention into the management of prisons; and (3) preventing windfall fee awards. None of these governmental objectives support the constitutionality of § 1997e(d)(2).

1. Reducing frivolous litigation

The legislative history surrounding the PLRA suggests that Congress' primary goal was to reduce the filing of frivolous lawsuits by prisoners. *See e.g.*, 141 Cong. Rec. §7498-01, S7524 (daly ed. May 25, 1995)(Statement of Senator Dole). The goal of reducing frivolous lawsuits is legitimate, but the means for achieving it by restricting the attorney fees awarded in favor of prevailing prisoner-plaintiffs is not rationally related to the goal.

A prisoner can obtain a fee award under § 1988 only if he prevails on his claim. Therefore, the only prisoners who are affected by the fee restrictions of § 1997e(d)(2) are those whose claims are meritorious, *i.e.*, non-frivolous. Because prisoners with frivolous claims are not hurt economically by reducing the amount of attorney's fees that a prisoner can recover, Congress neither took away any incentive to bringing a frivolous lawsuit nor created any economic disincentive to doing so.

Nonetheless, the First Circuit Court of Appeals in *Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000) agreed with Respondents' contention that § 1997e(d)(2) may further the governmental interest of deterring frivolous lawsuits by prisoners. Specifically, the First Circuit suggested two conceivable ways in which the cap might reduce the filing of frivolous prisoner lawsuits. First, the fee cap might induce prisoners to refrain from filing frivolous claims since attorneys, faced with the prospect of a low fee award due to

the cap, would be unwilling to represent them. *Id.* at 45. Second, the fee cap could dissuade attorneys from encouraging prisoners to file frivolous lawsuits. *Id.*

The First Circuit's holding ignores the reality that prior to the enactment of the PLRA, neither prisoners nor their attorneys could recover attorney fees under § 1988 for the prosecution of frivolous claims. In any event, the First Circuit's holding conflicts with this Court's decisions in *Lindsey v. Normet*, 405 U.S. 56 (1972) and *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

In *Lindsey*, this Court struck down, under rational basis review, an Oregon statute that required a defendant in an action brought under the state's forcible entry and wrongful detainer statute ("FED statute") who wished to appeal to file a double-bond. This Court found that this provision, by imposing a requirement not imposed on other civil litigants wishing to appeal, "imposes additional requirements that ... bear no reasonable relationship to any valid state objective and that arbitrarily discriminates against tenants appealing from adverse decisions in FED actions." *Lindsey*, 405 U.S. at 76. Significantly, as relevant here, this Court rejected the state's argument that the double-bond requirement reduced frivolous appeals. In so holding, this Court reasoned:

> The claim that the double bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but allows meritless appeals by others who can afford the bond.

Id. at 78.

The district court below properly reasoned that this case is even stronger than *Lindsey* because, unlike the statute in *Lindsey* that affected *some* frivolous appeals, § 1997e(d)(2) does not affect any frivolous lawsuits because it applies only to meritorious claims.

In *Rinaldi*, discussed in detail above, this Court considered whether the state's requirement that prisoners prepay for trial transcripts in connection with their appeals could be justified as a deterrent to frivolous prisoner appeals. Because the prepayment requirement applied solely to appellants in confinement, it had the effect of deterring many appeals which were not frivolous even if unsuccessful, while having no effect at all on frivolous appeals taken by *pro se* appellants who were not confined. While assuming that the state could place the same burden on all defendants seeking access to an appellate remedy, this Court refused to countenance "unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi*, 384 U.S. at 310.

By overlooking the teaching of *Rinaldi* (which is not cited in its opinion) and failing to insist upon a "reasoned distinction," the Ninth Circuit Court of Appeals upheld the PLRA restrictions at issue in *Madrid v. Gomez*, 190 F.3d 990 (9th Cir. 1999). There, the court postulated that the purpose of the PLRA's attorney fee restrictions was to curb frivolous suits by prisoners and to minimize the state's costs associated with them. Because it is conceivable that prisoners file more frivolous suits than nonprisoners, it was rational for Congress, according to the court, to have targeted prisoner suits for legislative attention, a point not in dispute here. The Ninth Circuit went awry when it confronted plaintiff's argument that the policy of squelching frivolous suits is not advanced by penalizing plaintiffs whose claims have prevailed. The court, citing *Heller v. Doe*, 509 U.S. 312 (1993), summarily brushed aside the argument with the true but inapposite observation that for purposes of the rational basis test Congress is not bound to perfectly "fit the means to the ends." *Madrid*, 190 F.3d at 996 n.8.

Heller makes it clear that in reviewing legislative classifications under the rational basis test, courts are not licensed to pass judgment on the "wisdom, fairness, or logic of legislative choices." 509 U.S. at 319. But neither *Heller* nor any other decision of this Court has licensed courts to ratify a classification that lacks a rational relationship to a legitimate state interest.

As set forth in Judge Daughtrey's dissenting opinion and in *Johnson v. Daley*, 117 F. Supp.2d 889, 900 (W.D. Wis. 2000) (holding that the attorney fee limitations of the PLRA are unconstitutional), it is irrational to assume that prisoners with frivolous claims will be deterred from filing them because of the congressionally-imposed limit on attorney fee awards. As stated by the court in *Johnson*:

> [I]t is irrational to conclude that [a *pro se* prisoner] bases his decision [to file a civil rights claim] on the distant possibility that at some future time, his presently nonexistent lawyer might recover a smaller rather than a larger amount of fees ... A prisoner may harbor hopes of a substantial monetary award (as do non-prisoner plaintiffs), but he has no reason to take into consideration the size of the fee award to his counsel.

Id. at 896.

Section 1997e(d)(2) must be struck down, not merely because the evidence is lacking that fee restrictions will in fact deter frivolous actions or because the two fit together imperfectly, but because there is no rational connection between the law and its objective, anymore than there was in *Rinaldi* and *Lindsey*, *supra*.

2. Reducing intervention of federal courts into prison management

Respondents' proffered justification that capping attorney fee awards will reduce federal court intrusions into daily prison management matters is also unpersuasive. In essence, Respondents contend that it is constitutional to treat prisoners differently under § 1988 than nonprisoners because when prisoners prevail in their lawsuits, correctional officials have to modify their practices; they cannot continue to run their prisons as they have in the past. The illegitimate desire to persist in violating prisoners' constitutional rights because

correctional officials would face challenges during the process of bringing their facilities into compliance with constitutional requirements cannot, by definition, legitimize the disparate treatment of prisoners under § 1988. Moreover, as stated by Judge Daughtrey in her dissenting opinion, "[t]o the extent that litigants are able to establish constitutional violations by prison officials, the courts are duty-bound to rectify those transgressions. Any attempt, therefore, to restrict such relief unconstitutionally subverts bedrock principles lying at the core of our federal system of government." App., *infra*, 27a-28a.

3. Preventing windfall fee awards for attorneys

The last rationalization offered by Respondents for the PLRA's fee cap is the need to prevent attorneys representing prisoners from collecting large fees for their services in cases in which they obtain only small or nominal damage awards. Again, Judge Daughtrey correctly observed in her dissenting opinion that no civil rights litigant who seeks fees under 42 U.S.C. § 1988 is entitled to an unlimited fee award merely upon application for such remuneration. Indeed, this Court has established a strict system of court oversight to ensure that attorney fee awards are proportional to the relief recovered and do not result in windfalls. *See Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) (holding that "[t]he very nature of recovery under § 1988 is designed to prevent any such "windfall" ... [because] fee awards, properly calculated, by definition will represent the reasonable worth of services rendered in vindication of a plaintiff's civil rights claim").

II. Review Is Warranted Because The Court Of Appeals Failed To Analyze Whether The 25 Percent Reverse Fee Provision Contained In § 1997e(d)(2) Violates The Equal Protection Component Of The Fifth Amendment.

Review of the court of appeals' decision in this case is also warranted because it failed to address whether the reverse-fee provision of § 1997e(d)(2) violates equal protection. The reverse-fee portion of § 1997e(d)(2) requires prisoners to contribute up to 25 percent from the judgment to satisfy the resulting award of attorney fees.

The premise underlying the court of appeals' decision – that § 1997e(d)(2) deters marginal or trivial claims and protects the public fisc by "dissuad[ing] attorneys from taking prisoner civil rights cases" – is inapplicable to the reverse-fee provision. Attorneys will not be dissuaded from taking a prisoner civil rights case as a result of the reverse-fee provision because attorneys will receive the *same* amount of fees regardless of whether a portion of the fees is taken from the judgment or the fees are entirely paid by the defendant(s). For example, if a court awards a prevailing prisoner $1,000 in attorney fees, the attorney will receive the full $1,000 regardless of whether a portion of the award comes from the judgment or entirely from the defendant(s). Thus, the reverse-fee provision does not act as a disincentive for attorneys to represent prisoners in civil rights cases.

Perhaps more significantly, this Court's decision in *Rinaldi*, *supra*, is dispositive that the reverse-fee provision contained in § 1997e(d)(2) is unconstitutional. As stated above, in *Rinaldi* this Court struck down as unconstitutional a law that required indigent prisoners who appealed unsuccessfully from their convictions to reimburse the county for the cost of trial transcripts in connection with appeals out of their prison earnings, but did not require other similarly situated people to do the same. Here, § 1997e(d)(2)'s requirement that prisoners reimburse defendants for a portion of attorney fees awarded against them is virtually identical to the reimbursement statute at issue in *Rinaldi*.

Simply put, the reverse-fee provision of the PLRA is unconstitutional for the same reasons as the statute at issue in *Rinaldi*. Review by this warranted to remedy the conflict between the court of appeals' decision and decisions from this Court.

III. Review Is Warranted Because The Court Of Appeals Misapplied The Rules Of Statutory Construction In Holding That § 1997e(d)(2) Applies To The Facts Of This Case.

Even assuming, *arguendo*, that § 1997e(d)(2) is constitutional, review is warranted because the court of appeals misapplied the rules of statutory construction in holding that § 1997e(d)(2) applies to the facts of this case. As argued below, a close analysis of § 1997e(d)(2) reveals that it is completely silent on the extent of an award of attorney fees where such an award is greater than 150 percent of the judgment. Section 1997e(d)(2) provides, in relevant part, "*If* the award of attorney's fees *is not* greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2) (emphasis added). § 1997e(d)(2) does not address the situation in this case where the award of attorney fees *is greater than* 150% of the judgment. For this reason, § 1997e(d)(2) must not be construed to apply to this case.

In resolving an issue of statutory construction, a court must first look to the language of the statute itself and, if the statutory language is unclear or ambiguous, to legislative history. *Toibb v. Radloff*, 501 U.S. 157, 161 (1991); *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Where particular language is used in one section of a statute, but omitted from another, it is presumed that Congress did so intentionally, and not inadvertently. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("It is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in another part reflects a congressional intent that the exclusion was not inadvertent.")

With respect to § 1997e(d)(2), if Congress intended to limit an award of attorney fees where the award would be greater than 150% of the judgment, it could have easily said so in the statute. For example, § 1997e(d)(21) could have provided, "If the award of attorney's fees is greater than 150

percent of the judgment, Defendants shall pay no more than 150% of the total judgment as attorney's fees." In the alternative, § 1997e(d)(2) could have provided, "If the award of attorney's fees is greater than 150% of the judgment, Defendants shall not pay any amount in attorney fees."

In situations where Congress intended to absolutely limit attorney fees in the PLRA, it explicitly said so. Indeed, in § 1997e(d)(3), Congress specifically stated:

> *no award of attorney's fees* in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(Emphasis added). Given Congress' failure to indicate that "no award" of attorney fees should be paid by a defendant where the award of attorney fees is greater than 150 percent of the judgment, § 1997e(d)(2) is not applicable to this case.

Because the court of appeals misapplied the rules of statutory construction established in this Court's prior decisions, review is warranted in this case.

IV. Review Is Warranted Because The Question Presented Is Important

Review is warranted in this case because § 1997e(d)(2) clearly presents a constitutional issue that courts have struggled to reconcile. While three federal appeals courts have upheld the constitutionality of § 1997e(d)(2), the Third Circuit Court of Appeals could not reach a decision when it addressed the issue *en banc*. *Collins v. Montgomery County Bd. Of Prison Inspectors*, 176 F.3d 679, 686 (3d Cir. 1999) (*en banc*). Moreover, prior to the Sixth Circuit's decision in *Hadix v. Johnson*, at least three other federal district courts concluded that § 1997e(d)(2) is unconstitutional, in part, for the reasons set forth in the

district court's decision in this case.[5] Unless this Court resolves the issue of the constitutionality of § 1997e(d)(2) now, conflicting district court decisions will continue to proliferate in those circuits that have not reached the issue presented here.

Review is also important because of the severe negative impact § 1997e(d)(2) will have on the prosecution of meritorious prisoner civil rights claims. As the court of appeals recognized (despite its adverse holding), by virtue of § 1997e(d)(2), "[a]ttorneys will be dissuaded from taking prisoner civil rights cases" because "§ 1997e(d)(2) serves to ensure that attorneys will be left uncompensated for their efforts whenever the plaintiff's recovery is meager." App., *infra*, 12a. The resulting reduced pool of attorneys will have, as the court of appeals acknowledged, a disparate impact on African-American and other "minority" groups' access to courts because of the disproportionate number of such people incarcerated. In addition, § 1997e(d)(2) will result in many illiterate prisoners whose constitutional rights are violated, but who cannot draft the legal papers necessary to proceed *pro se* without a remedy because the pool of attorneys who accept prisoner civil rights cases will be greatly diminished. The pool of attorneys who accept prisoner civil rights cases on a *pro bono* basis will also be reduced because of § 1997e(d)(2)'s limitation on attorney fees.

The unfortunate reality is that Congress appears to have targeted successful prisoner civil rights litigants because prisoners are a politically unpopular class of people. If this Court allows § 1997e(d)(2) to stand as a constitutional exercise of congressional legislative action, Congress will

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[5] *See Johnson v.* Daley, 117 F.Supp.2d 889 (W.D. Wis. 2000); *Wolff v. Moore*, 104 F.Supp.2d 892 (S.D. Ohio 2000), *vacated*, 234 F.3d 1271 (6th Cir. 2000); *McLindon v. Russell*, No. C-1-95-676, 2000 WL 1221854 (S.D. Ohio, June 15 2000), *rev'd and vacated*, 19 Fed. Appx. 349, 2001 WL 1136073 (Sept. 19, 2001). *Compare Carbonell v. Acrish*, 154 F. Supp.2d 552 (S.D. NY 2001); *Morrison v. Davis*, 88 F.Supp.2d 799 (S.D. Ohio 2000).

have no disincentive to pass similar statutes that arbitrarily discriminate against other classes of people that may be unpopular among the general public (*i.e.* people receiving welfare, people without a high school education, *etc.*).

In sum, the authorities are not uniform on a matter of importance to the courts, and to all prisoners who seek to vindicate meritorious civil rights claims. This case presents a rare opportunity for this Court to address the disputed PLRA provision and to bring certainty and uniformity to this area. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail the end of each document.)
Nos. 99-2001/99-2004/99-2349

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM H. WALKER, JR.,
Plaintiff-Appellee/Cross-Appellant (99-2004),

v.

THOMAS BAIN, Guard; JANICE METZGER,
Defendants-Appellants (99-2001/2349)/Cross-Appellees,

THOMAS BIRKETTE, Warden,
Defendant,

UNITED STATES OF AMERICA,
Intervenor.

March 16, 2001, Argued

July 20, 2001, Decided

July 20, 2001, Filed

COUNSEL:
ARGUED: Linda M. Olivieri, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellant.

Deric J. Bomar, DYKEMA GOSSETT, Detroit, Michigan, for Appellee.

Daniel Kaplan, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, Washington, D.C., for Intervenor.

ON BRIEF: Linda M. Olivieri, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellant.

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JUDGES:
Before: KEITH, NORRIS, and DAUGHTREY, Circuit Judges. KEITH, J., delivered the opinion of the court, in which NORRIS, J., joined. DAUGHTREY, J., delivered a separate opinion concurring in part and dissenting in part.

OPINIONBY:
DAMON J. KEITH

OPINION:

DAMON J. KEITH, Circuit Judge. Plaintiff-appellee William Walker, a Michigan state prisoner, brought suit against corrections officers claiming First Amendment retaliation in violation of *42 U.S.C. § 1983*. A jury returned a verdict in Walker's favor in part, setting damages of $ 426. Upon Walker's motion for attorney fees pursuant to *42 U.S.C. § 1988*, the magistrate judge held that the attorney fee cap set forth in § 803(d)(2) of the Prison Litigation Reform Act (PLRA), codified at *42 U.S.C. § 1997e*(d)(2), violated Equal Protection. The court subsequently granted in part Walker's motion for attorney fees in the amount of $ 34,493.72. Defendants appeal from these two orders. Walker cross-appeals the denial of his motion for new trial. For the reasons that follow, we **REVERSE** the order ruling that § 1997e(d)(2) is unconstitutional, **VACATE** the order granting in part Walker's motion for attorney fees, **REMAND** for a redetermination of fees under the PLRA, and **AFFIRM** the denial of Walker's motion for a new trial.

I. BACKGROUND

A. Factual History

Walker, an inmate, serves as a "jailhouse lawyer" at Standish Maximum Correctional Facility ("Standish"). In addition to handling his own legal matters, Walker assists other Standish inmates in connection with their legal matters. Walker routinely filed grievances against correction officers, and assisted other inmates in filing and handling grievances.

On April 4, 1995, in retaliation for his filing of grievances, defendants-appellants Thomas Bain and Janice Metzger, Standish correction officers, performed a "shake down" of Walker's cell, and improperly confiscated documents and personal property. At that time, Walker was preparing for several cases, and had documents in stacks in various places in his cell.

Prior to April 4, 1995, Walker requested grievance forms from, and filed grievances against, both Bain and Metzger. Walker testified that Bain often delayed in providing him with grievance forms, and would provide only one form when he requested several. Walker reported Bain's conduct to Bain's superior officer, who ordered Bain to provide Walker with the number of grievance forms he requested.

On the date of the unlawful retaliatory incident, Metzger asked Walker if he wanted to take a shower, and he responded that he did. Subsequently, Bain came to Walker's cell and the two had a disagreement over whether Walker would be permitted to shower. When Bain indicated that Walker would not be taking a shower, Walker requested a grievance form so that he could report Bain's conduct. Bain stated that he was tired of grievances, and he and Metzger escorted Walker to the shower. Walker testified that Bain indicated that he would teach Walker a lesson about filing grievances.

While Walker was using the shower, Bain and Metzger searched his cell. Bain and Metzger left Walker's cell with a large plastic bag containing documents.

Bain and Metzger escorted Walker back to his cell after his shower. Upon his return, Walker surmised that his cell had been the subject of a "shake down." He called for another corrections officer to view the condition of his cell, and requested that photographs and a video be taken of his cell. Walker's request was denied, and Walker was ordered into his cell. When he entered his cell, Walker's wrists were handcuffed behind his back, and a leather strap was attached to the handcuffs. After the cell door had closed, Walker's hands and arms went through the food slot on the door in such a manner as to cause minor scrapes and cuts to Walker's hands and wrists. The prison nurse treated Walker's abrasions later that evening. Walker subsequently determined that many of his legal documents were missing.

B. Procedural History

On May 30, 1995, Walker filed a **pro se** complaint in the United States District Court for the Eastern District of Michigan against Bain and Metzger. Walker asserted retaliation claims pursuant to *42 U.S.C. § 1983* against both defendants.

Walker's § 1983 claims against defendants survived a motion to dismiss and three motions for summary judgment. Walker began filing motions for appointment of counsel on September 20, 1995. The district court finally appointed counsel on March 10, 1997, after the effective date of the PLRA. On July 21, 1998, the district court referred the case to Magistrate Judge Paul Komives for all further proceedings and entry of judgment with the consent of the parties pursuant to *28 U.S.C. § 636* (c).

A jury trial began on October 13, 1998, and concluded on October 20, 1998. The court submitted the case to the jury on special interrogatories, and the jury returned its answers on October 20, 1998. The court entered judgment in favor of defendants on February 26, 1999. Walker moved to amend the judgment pursuant to Fed. R. Civ. P. 59(e) on March 12, 1998, based on an intervening change of controlling law. On April 23, 1999, the court granted Walker's motion, and ordered entry of an amended judgment in favor of Walker and against

defendants jointly and severally in the amount of $ 1.00, and in favor of Walker and against Bain and Metzger in the amounts of $ 300.00 and $ 125.00, respectively. Walker filed a motion for partial new trial on May 7, 1999. The court denied Walker's motion in an order dated August 3, 1999. Walker filed an appeal from the court's order denying his motion for a partial new trial.

On May 7, 1999, as a partially successful civil rights litigant under *42 U.S.C. § 1983*, Walker filed a motion for attorney fees seeking $ 36,046.25 pursuant to *42 U.S.C. § 1988* and Fed. R. Civ. P. 54(d). Defendants filed a response arguing that, pursuant to § 803(d)(2) of the PLRA, Walker was entitled to a fee of only $ 629.00. Walker filed a reply brief arguing that the PLRA attorney fee cap was unconstitutional both on vagueness and Equal Protection grounds. In an order dated August 3, 1999, Magistrate Judge Komives held that the statute was not unconstitutionally vague, but that it did violate the Equal Protection component of the Fifth Amendment of the United States Constitution. **See *Walker v. Bain***, *65 F. Supp. 2d 591, 599-605 (E.D. Mich. 1999)*. The court denied defendants' motion for reconsideration on August 30, 1999. **See *id.*** *at 606-10.* Defendants filed a timely appeal from the order of the court.

On October 18, 1999, the court granted Walker's motion for attorney fees in part, and ordered defendants to pay Walker's reasonable attorney fees in the amount of $ 34,493.72. Defendants filed a timely notice of appeal from the court's order granting in part Walker's motion for attorney fees. We consolidated the three appeals taken from the magistrate's final orders.

We permitted the United States to intervene pursuant to *28 U.S.C. § 2403* to defend the constitutionality of the PLRA. The Attorney General of the State of Ohio participated on appeal as **amicus curiae**, urging the constitutionality of PLRA.

II. DISCUSSION

A. The PLRA Fee Cap

The PLRA contains various provisions that were intended to discourage prisoners from filing claims that are unlikely to succeed. **See *Crawford-El v. Britton*, *523 U.S. 574, 596, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998)*.** Among the many new changes relating to prisoner civil rights suits, the PLRA modifies the application of *42 U.S.C. § 1988* [1] to prevailing prisoners by providing stringent limitations on both the availability and the amount of attorney fee awards. **See** *42 U.S.C. § 1997e*(d). The PLRA's attorney fee provisions are found at *42 U.S.C. § 1997e*(d), which provides:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [*42 U.S.C. § 1988*], such fees shall not be awarded, except to the extent that–
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [*42 U.S.C. § 1988*]; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the

> amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.
>
> (4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to [*42 U.S.C. § 1988].*

42 U.S.C. § 1997e(d) (footnotes omitted).

We are confronted with two issues concerning § 1997e(d)(2): first, whether this provision is inapplicable to attorney fee awards that are in excess of 150 percent of the judgment; and second, whether this provision violates the Equal Protection component of the Fifth Amendment to the United States Constitution. We review **de novo** the issue of statutory interpretation, **see *Henry Ford Health Sys. v. Shalala***, *233 F.3d 907, 910 (6th Cir. 2000)*, and the challenge to the constitutionality of a federal statute. **See *Singleton v. Smith***, *241 F.3d 534, 538 (6th Cir. 2001).*

1. Interpretation of PLRA § 803(d)(2), *42 U.S.C. § 1997e*(d)(2)

Walker contends that the second sentence of § 1997e(d)(2) is inapplicable to his situation, **i.e.**, where an award of attorney fees is greater than 150 percent. Section 1997e(d)(2) provides that: "Whenever a monetary judgment is awarded . . .,a portion of the judgment (not to exceed 25

percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. **If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.**" *42 U.S.C. § 1997e*(d)(2) (emphasis added).

Walker contends that, because the second sentence of § 1997e(d)(2) is silent on the extent of an attorney fee award where such an award is greater than 150 percent of the judgment, it is inapplicable to his situation. Walker suggests that, had Congress intended to limit an award of attorney fees in the event the award was greater than 150 percent of the judgment, it could have stated this expressly.

The court below rejected Walker's contention, finding that Walker's interpretation of § 1997e(d)(2) would render the 150 percent cap meaningless. **See *Walker v. Bain*, *65 F. Supp. 2d 591, 598 (E.D. Mich. 1999)*.** The court noted that, under the plain language of the statute, a defendant is liable for only the difference between the 150 percent limit and the amount of the judgment used to satisfy the fee award. **See id.** The court suggested that, while a court could theoretically make an award of fees that is well above 150 percent of the judgment, the defendant would be liable only for an amount up to the 150 percent limit. **See id.**

In resolving this question of statutory interpretation, we must first look to the language of the statute itself. **See *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, *496 U.S. 226, 237, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990)*; *United States v. Bailey*, *228 F.3d 637, 638 (6th Cir. 2000)*.** "We read statutes and regulations with an eye to their straightforward and commonsense meanings." ***Henry Ford Health Sys. v. Shalala*, *233 F.3d 907, 910 (6th Cir. 2000)*.** We ascertain the plain meaning of a statute by reviewing "the particular statutory language at issue, as well as the language and design of the statute as a whole." ***K Mart Corp. v. Cartier, Inc.*, *486 U.S. 281, 291, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988)*.** "When we can discern an unambiguous and plain meaning from the language of a statute, our task is at an end." ***Bartlik v. United States***

Dep't of Labor, *62 F.3d 163, 166 (6th Cir.1995)* (**en banc**).

We may not, however, rely on the literal language of the statute where such reliance would lead to absurd results or an interpretation which is inconsistent with the intent of Congress. **See *United States v. Ron Pair Enters., Inc.***, *489 U.S. 235, 242, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989)*; ***Appleton v. First Nat'l Bank of Ohio***, *62 F.3d 791, 801 (6th Cir. 1995)*. Every word in the statute is presumed to have meaning, and we must give effect to all the words to avoid an interpretation which would render words superfluous or redundant. **See *Astoria Fed. Sav. & Loan Ass'n v. Solimino***, *501 U.S. 104, 112, 115 L. Ed. 2d 96, 111 S. Ct. 2166 (1991)*; ***Menuskin v. Williams***, *145 F.3d 755, 768 (6th Cir. 1998)*.

While Walker's interpretation of § 1997e(d)(2) is consistent with the literal language of the statute, it is inconsistent with the intent of Congress, renders the second sentence of the provision meaningless, and must therefore be rejected. Under Walker's theory: if the fee award is less than 150 percent of the damages, § 1997e(d)(2) applies and defendants are liable for the full amount of the award; if the award of fees is greater than 150 percent of the damages, defendants are liable for the full amount of the award under pre-PLRA law. Under this interpretation, the statute would not have any effect on the court's power to award, or the defendants' obligation to pay, attorney fees. Accordingly, Walker's interpretation renders the second sentence of § 1997e(d)(2) meaningless.

We believe that § 1997e(d)(2) must be read to limit defendants' liability for attorney fees to 150 percent of the money judgment. [2] We note that this interpretation is consistent with that of the few courts that have addressed the issue. **See, e.g., *Collins v. Montgomery County Bd. of Prison Inspectors***, *176 F.3d 679, 683 (3d Cir. 1999)* (noting that § 1997e(d)(2) "provides that the fees awarded cannot exceed 150% of the judgment"); ***Blissett v. Casey***, *147 F.3d 218, 220 (2d Cir. 1998)* (stating that § 1997e(d)(2) "appears (in unclear language) to provide that the [fee award]

is not to be borne by the defendant to the extent it exceeds 150 percent of the judgment"); **cf.** ***Boivin v. Black***, *225 F.3d 36, 38 (1st Cir. 2000)* (stating that "when a prisoner secures a monetary judgment in a civil action covered by the PLRA, [§ 1997e(d)(2)] caps the defendants' liability for attorneys' fees at 150% of the judgment").

Because we find that § 1997(d)(2) is fully applicable here, and thus serves to cap Walker's attorney fee award at 150 percent of the judgment, we proceed to the issue of whether this provision violates Equal Protection.

2. Constitutionality of PLRA § 803(d)(2), *42 U.S.C. § 1997e*(d)(2)

Since the PLRA fee cap neither involves a suspect classification nor infringes on the fundamental right of access to the courts, we analyze its constitutionality under the rational basis test. [3] **See *Hadix v. Johnson***, *230 F.3d 840, 843 (6th Cir. 2000)*. Under rational basis review, a law is valid if it "rationally furthers a legitimate [governmental] interest." ***Nordlinger v. Hahn***, *505 U.S. 1, 10, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992)*; **see also *Romer v. Evans***, *517 U.S. 620, 632, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996)* ("If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

Under rational basis review, the statute will be accorded a strong presumption of validity, and we must uphold the statute "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." ***Heller v. Doe***, *509 U.S. 312, 319-20, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993)* (quoting ***FCC v. Beach Communications, Inc.***, *508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)).* The government has no obligation to produce evidence to support the rationality of its statutory classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data.

See *Beach Communications*, *508 U.S. at 315.* Consequently, Walker bears the heavy burden of negating every conceivable basis that might support it. **See *Heller***, *509 U.S. at 320;* ***Lehnhausen v. Lake Shore Auto Parts Co.***, *410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973).*

Walker contends that § 1997e(d)(2) violates Equal Protection because it burdens only prisoners and does not advance any legitimate government interest. He argues that § 1997e(d)(2) is the product of animus towards prisoners. The court below agreed with Walker, finding that § 1997e(d)(2) was not rationally related to any legitimate government interest.

Bain and Metzger, the United States, and the State of Ohio (collectively, "the government") urge this Court to reverse the district court, and find that § 1997(d)(2) is not an unconstitutional violation of the Equal Protection component of the Fifth Amendment. The government argues that there is a rational relationship between the statute's classification and several legitimate government interests, which include: (1) deterring the filing of frivolous prisoner civil rights claims; (2) reducing trivial or inconsequential suits; (3) reducing judicial intervention into the management of prisons; (4) preventing windfall fee awards; (5) and protecting the public fisc. We need only address two of these proffered interests, as we are not writing on a clean slate.

In **Hadix v. Johnson**, this Court held that § 1997e(d)(3) of the PLRA, which imposes a cap on the hourly rate for attorney fees that prisoners may recover, while leaving non-prisoner plaintiffs free to recover reasonable attorney fees at the prevailing market rate, did not violate *Equal Protection. 230 F.3d 840, 842 (6th Cir. 2000).* There, we concluded that Congress could rationally intend § 1997e(d)(3) to decrease "marginal or trivial lawsuits." We reasoned that, since the PLRA would cause attorneys to require a greater likelihood of success before taking a case, many trivial claims would have to be litigated by prisoners **pro se**. Further, while some prisoners would continue the litigation of their marginal claims, we found it reasonable to conclude that at least some

would be dissuaded by the fact that they would have to shoulder the entire workload themselves. ***Hadix***, *230 F.3d at 845.*

In **Hadix,** we also concluded that § 1995e(d)(3) is rationally related to the government's legitimate interest in protecting state and federal treasuries. **Id.** We reasoned that Congress could have rationally concluded that prisoner civil rights litigation leads to attorney fees which are often disproportionate to the harm or injury. Thus, by reducing the number of marginal, albeit meritorious claims, some government resources would be preserved.

The government asserts that our decision in **Hadix** is dispositive on the issue of whether § 1997e(d)(2) violates Equal Protection. We must agree. In **Hadix** we held that the twin goals of decreasing marginal lawsuits and protecting the public fisc are legitimate government interests, and that decreasing an attorney fee award in the context of prisoner civil rights litigation serves both of these interests. Accordingly, **Hadix** necessarily dictates our finding that § 1997e(d)(2) survives rational level scrutiny. Indeed, it seems that our reasoning in **Hadix** is better supported here, since § 1997e(d)(2) is more likely to decrease the number of marginal lawsuits, and thus more likely to protect the public fisc, than § 1997e(d)(3). Attorneys will be dissuaded from taking prisoner civil rights cases by both of these provisions, but probably more so by § 1997e(d)(2). While § 1997(d)(3) merely caps the hourly rate for attorney fees that prisoners may recover, § 1997e(d)(2) serves to ensure that attorneys will be left uncompensated for their efforts whenever the plaintiff's recovery is meager. Because "rational attorneys will demand a greater likelihood of success before taking a prisoner's case," some prisoners with "marginal or trivial" claims "will be dissuaded by the fact that they will have to shoulder the entire workload themselves." ***Hadix***, *230 F.3d 840, 845.*

Walker has asserted no valid grounds for distinguishing between § § 1997e(d)(2) and 1997e(d)(3), other than to state the obvious: the two provisions are different. Walker notes that § 1997e(d)(2) differs from § 1997e(d)(3) in that the

former requires 25 percent of the attorney fee award to be paid out of the plaintiff's recovery. While this is true, this requirement merely buttresses the position that § 1997e(d)(2) is rationally related to serving the purposes of decreasing marginal prisoner lawsuits and protecting the public fisc. Walker also attempts to distinguish the two provisions by suggesting that the government's interpretation of § 1997e(d)(2) precludes an award of attorney fees where the attorney fee award is greater than 150 percent of the judgment. However, the government's position, which we have endorsed, is that § 1997e(d)(2) merely caps the defendants' liability for an attorney fee award at 150 percent of the money judgment. As there is no relevant distinction between § § 1997e(d)(2) and 1997e(d)(3), Walker's constitutional challenge is foreclosed by our reasoning in **Hadix**.

We note that two of our sister circuits have considered and rejected Equal Protection challenges to § 1997e(d)(2). **See *Boivin v. Black***, *225 F.3d 36, 46 (1st Cir. 2000)* ("Because a cap on attorneys' fees, particularly when linked with the requirement that the prisoner contribute part of the award to the payment of the fee, **see** *42 U.S.C. § 1997e*(d)(2), conceivably may discourage prisoners and their counsel from filing frivolous or low-value suits, we think that the fit is close enough to pass constitutional muster."); ***Madrid v. Gomez***, *190 F.3d 990, 996 (9th Cir. 1999)* ("Under [rational basis review], the PLRA certainly passes constitutional muster."). The Third Circuit, sitting **en banc**, split on the issue. **See *Collins v. Montgomery County Bd. of Prison Inspectors***, *176 F.3d 679, 686 (3d Cir. 1999)* (**en banc**) (noting that the court was "divided equally on the question of whether the limitation of the fees to 150% of the judgment is constitutional").

We are aware that § 1997e(d)(2) will have a strong chilling effect upon counsels' willingness to represent prisoners who have meritorious claims. We are also mindful that the "marginal or trivial" claims that result in a judgment for a prisoner, such as Walker, do in fact arise out of an actual, proven civil rights violation. We admit to being

troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual, albeit "technical," civil rights violations. However, we are aware that we are not authorized to act as a "'superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" ***Heller v. Doe***, *509 U.S. 312, 319, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993)* (**quoting *New Orleans v. Dukes***, *427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976)* (per curiam)). Moreover, our role is not "'to judge the wisdom, fairness, or logic of legislative choices.'" **Id.** (**quoting *FCC v. Beach Communications, Inc.***, *508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)*). Accordingly, we must conclude that § 1997e(d)(2) survives rational review.

B. Cross-Appeal

Walker argues that he is entitled to a new trial on several grounds. First, he contends that the magistrate gave an erroneous jury instruction that affected his substantial rights. Second, he asserts that he is entitled to a new trial because the magistrate erred in allowing defendants' counsel to question Walker about medical documents concerning Walker's alleged injuries. Finally, he argues that he is entitled to a new trial on the issue of damages because the jury's award of $ 1 in compensatory damages was against the weight of evidence and inconsistent with its award of punitive damages.

1. Standard of Review

We review the denial of a motion for a new trial under Fed. R. Civ. P. 59 for an abuse of discretion. **See *Greenwell v. Boatwright***, *184 F.3d 492, 499 (6th Cir. 1999)*; ***Wayne v. City of Sebring***, *36 F.3d 517, 525 (6th Cir.1994)*. "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of

judgment." **See *Powers v. Bayliner Marine Corp.*, *83 F.3d 789, 796 (6th Cir.1996)*.** To constitute proper grounds for granting a new trial, an error, defect or other act must affect the substantial rights of the parties. **See** Fed. R. Civ. P. 61. "The trial court should deny such a motion if the verdict is one that reasonably could be reached, regardless of whether the trial judge might have reached a different conclusion were he the trier of fact." ***Wayne*, *36 F.3d at 525*; ***Anchor v. O'Toole*, *94 F.3d 1014, 1021 (6th Cir.1996)*.**

2. Jury Instructions

We begin by addressing defendants' contention, raised for the first time on appeal, that Walker's motion for a new trial was untimely. Defendants' argument is not well-taken.

Fed. R. Civ. P. 59(b) provides that "any motion for a new trial shall be filed no later than 10 days after entry of the judgment." Walker filed his motion for new trial 10 days after entry of the amended judgment. The magistrate noted that Walker's motion was timely, as the 10-day period began to run from the date of the amended judgment rather than the original judgment. The magistrate concluded that, because the amended judgment altered the legal rights and obligations of the parties, it triggered a new 10-day period from which the parties could file Rule 59 motions.

Defendants do not dispute the magistrate's conclusion that the amended judgment triggered a new 10-day period. Rather, they argue that because Walker "could have" brought his motion earlier, his motion should have been dismissed as untimely. Defendants do not purport to base their contention on case law or the Rules; rather, they appeal to considerations of equity and finality. We reject their contention as unsupported. Accordingly, we move to the merits of Walker's claim.

Walker argues that he is entitled to a new trial because the court gave an erroneous jury instruction. Specifically, the court instructed the jury that Walker had to prove as an element of his First Amendment retaliation claims that defendants' actions "shock the conscience." We agree that

this instruction was erroneous, but do not find it to be sufficiently prejudicial such that a new trial is warranted.

"When instructions are challenged on appeal, our duty is not to read the instructions word for word in search of an erroneous word or phrase." ***Wilson v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO***, *83 F.3d 747, 757 (6th Cir. 1996)* (**quoting** ***O-So Detroit, Inc. v. Home Ins. Co.***, *973 F.2d 498, 502 (6th Cir.1992))*. Rather, we review the instructions "as a whole in order to determine whether they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury to reach its decision." ***Beard v. Norwegian Caribbean Lines***, *900 F.2d 71, 72 (6th Cir.1990)*.

We believe that the erroneous jury instruction did not result in unfair prejudice to Walker due to the magistrate's use of special interrogatories. [4] The magistrate pursued this course because it was unclear at the time of trial whether Walker's First Amendment retaliation claims were governed by the First Amendment standard [5] or the heightened Fourteenth Amendment substantive due process standard. [6] **See, e.g.,** ***Thaddeus-X v. Blatter***, *175 F.3d 378, 388 (6th Cir. 1999)* (**en banc**) (noting that the Sixth Circuit had applied the substantive due process standard to retaliation claims based on the violation of an enumerated constitutional right).

According to the special verdicts, the jury found that both defendants improperly confiscated and removed Walker's personal papers from his cell, that Walker's previous filing of grievances and lawsuits was a substantial and motivating factor behind this conduct, but that the defendants' actions did not constitute an egregious abuse of power or otherwise shock the conscience. Following this Court's decision in ***McLaurin v. Cole***, *115 F.3d 408, 411 (6th Cir. 1997)*, the magistrate applied the heightened "shocks the conscience" requirement to Walker's claims, and entered judgment in favor of defendants.

Subsequently, however, this Court issued an **en banc** decision in ***Thaddeus-X v. Blatter***, *175 F.3d 378, 388 (6th Cir. 1999)*, which held that the heightened substantive due process standard did not apply to prisoner retaliation claims based on the violation of an enumerated constitutional right. Under the applicable standard, then, Walker had proven a First Amendment retaliation violation. Based on the **Thaddeus-X** decision, Walker filed a motion to alter or amend the judgment, seeking entry of judgment in his favor. The magistrate judge granted Walker's motion, and entered judgment in favor of Walker and against the defendants in the amount of $ 426.

The use of special interrogatories in the case clearly reveals that the erroneous jury instruction had no effect on the result. Had the case been submitted to the jury using a general verdict form, a new trial probably would have been justified. **See, e.g., *Lewis v. City of Irvine, Kentucky***, *899 F.2d 451, 456-57 (6th Cir. 1990)* (holding that a new trial was warranted as the trial court erroneously instructed the jury on the legal standard applicable to the plaintiff's claim). Here, however, the magistrate wisely avoided prejudicial error and the necessity of a new trial by using the special interrogatories.

Walker contends that the erroneous jury instruction affected his substantial rights because the instruction misled and confused the jury, and that the use of special interrogatories did not cure this error. In support of this argument, Walker notes that several times during his counsel's closing arguments, he characterized defendants' conduct as egregious and shocking. He argues that counsel's argument would have been "substantially different and more persuasive" had he not had to focus on the burden of proof. Appellee's Br. at 62.

We do not believe that Walker's closing arguments are of any relevance in this context. Counsel's closing statements certainly are not relevant to the issues of whether the magistrate's jury "instructions, viewed as a whole, were confusing, misleading, or prejudicial," ***Vance v. Spencer County Pub. Sch. Dist.***, *231 F.3d 253, 263 (6th Cir. 2000)*

(**quoting *Innes v. Howell Corp.***, *76 F.3d 702, 714 (6th Cir. 1996)* (quotation omitted)), or whether the erroneous jury instruction "affected the substantial rights of the parties." Fed. R. Civ. P. 61.

Moreover, Walker's argument misses the mark since, regardless of whether he had to show defendants' conduct shocked the conscience, he had to prove that the alleged unlawful conduct actually happened. The interrogatories reveal that he did not succeed in this regard. The jury's finding that the conduct did not happen rendered the erroneous jury instruction harmless. While the court's instruction required Walker to prove one additional element, it did not alter his burden to prove the other elements which underlie the retaliation claim. Therefore, we agree with the magistrate that the erroneous jury instruction did not affect Walker's substantial rights.

3. Prejudicial Evidence

Next, Walker contends that he is entitled to a new trial because the court below erred in permitting defendants' counsel to question Walker, in front of the jury, about the absence of his medical records. Walker argues that this line of questioning was irrelevant and highly prejudicial, and such conduct tended to mislead the jury.

Importantly, Walker did not object to the allegedly prejudicial conduct at trial, nor did he raise the issue in his Fed. R. Civ. P. 59 motion. Accordingly, we decline to consider this argument for reversal of the lower court on this basis. **See *Harshbarger v. Pees***, *66 F.3d 775, 777 n. 3 (6th Cir.1995).* [7]

4. Damages

Lastly, Walker claims that he is entitled to a new trial on the issue of damages because the award of damages was against the manifest weight of the evidence. Walker argues that he presented evidence of pain, suffering and mental anguish, and that the defendants did not rebut this evidence. Specifically, Walker notes that he testified that defendants'

conduct affected his sleeping and his willingness to exercise his First Amendment rights in the future. Moreover, he argues that the jury's award of nominal compensatory damages is inconsistent with its award of punitive damages and is against the weight of the evidence.

The scope of review of a damage award is extremely narrow. A trial court may not grant a new trial on the ground of insufficient damages unless the jury verdict is one that could not reasonably have been reached. **See *Anchor v. O'Toole***, *94 F.3d 1014, 1021 (6th Cir. 1996)*; ***TCP Indus., Inc. v. Uniroyal, Inc.***, *661 F.2d 542, 546 (6th Cir.1981)*. The remedy of a new trial for inadequate damages is appropriate only where the evidence indicates that the jury awarded damages in an amount substantially less than unquestionably proved by the plaintiff's uncontradicted and undisputed evidence. **See *Anchor***, *94 F.3d at 1021*. Thus, if the verdict is supported by some competent, credible evidence, a trial court will be deemed not to have abused its discretion in denying the motion. **See id.**

The fact that the defendants did not rebut Walker's testimony directly does not necessarily render the jury's determination on the issue of damages against the great weight of evidence. Walker had the burden of proving damages, and the only evidence of damages was Walker's self-serving testimony about his mental distress. This is not a case where the jury disregarded clear, objective and uncontradicted evidence. The jury was free to accept or disregard Walker's statement, and it chose to disregard it. There is no error in upholding civil rights jury verdicts awarding no compensatory damages where the plaintiff's sole evidence of damages is his or her own testimony of subjective injuries. **See *Robinson v. Cattaraugus County***, *147 F.3d 153, 160 (2d Cir. 1998)*; ***Briggs v. Marshall***, *93 F.3d 355, 360-61 (7th Cir. 1996)*; ***Davet v. Maccarone***, *973 F.2d 22, 29-30 (1st Cir. 1992)*.

We also note that it was not inconsistent for the jury to conclude that defendants' conduct was malicious enough to justify punitive damages, but that Walker suffered no actual, compensable injuries as a result. In civil rights cases, punitive

damages may be awarded in the absence of a compensatory award. **See *Carlson v. Green***, *446 U.S. 14, 22 n.9, 64 L. Ed. 2d 15, 100 S. Ct. 1468 (1980)*; ***Robinson v. Cattaraugus County***, *147 F.3d 153, 161 (2d Cir. 1998)*. The jury's failure to award compensatory damages was not against the great weight of the evidence, nor was it inconsistent with its award of punitive damages.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the magistrate's order holding that § 803(d)(2) of the PLRA, *42 U.S.C. § 1997e*(d)(2), violates Equal Protection. We **VACATE** the order granting in part Walker's motion for attorney fees, and **REMAND** for redetermination of fees under the PLRA. Finally, we **AFFIRM** the magistrate's order denying Walker's motion for new trial.

Footnotes

[1] Title *42 U.S.C. § 1988*(b) provides that: "in any action or proceeding to enforce provisions of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs."

[2] We caution that if non-monetary relief is obtained, either with or without money damages, § 1997e(d)(2) would not apply. **See *Boivin v. Black***, *225 F.3d 36, 41 n.4 (1st Cir. 2000)*.

[3] The dissent points out, and we agree, that the statutory provision at issue here "has a disparate impact on suspect classes and on individuals exercising fundamental rights." We are sensitive to the very high degree of disproportionality in the incarceration rates for blacks compared to whites. We too believe that this subgroup of prisoners, as well as other minorities, fall victim to a disproportionately higher rate of "acts of brutality, excessive force, retaliation, and deliberate indifference." We share the concerns raised by the dissent in

this regard. Our decision today rests not on a desire to sanction or facilitate such criminal and unconstitutional acts, and should not be so read. Rather, our decision is based squarely on Sixth Circuit precedent.

[4] On issues of liability, the special interrogatories asked the jury to answer the following questions as to each defendant:

> 1. a. Did defendants ransack or trash plaintiff's cell on April 4, 1995?
>
> b. Did defendants improperly confiscate and remove papers and/or other property from plaintiff's cell on April 4, 1995?
>
> c. If you answered "yes" to either Question 1a or Question 1b, was the fact that plaintiff had previously filed grievances and lawsuits against the defendants or their colleagues a substantial or motivating factor behind that conduct?
>
> d. If you answered "yes" to either Question 1a or Question 1b, and "yes" to Question 1c, did the conduct of defendants amount to an egregious abuse of power; that is, was it conduct which shocks the conscience?
>
> 2. a. Did defendants, independently or collectively, verbally threaten and attempt to intimidate plaintiff because of his previous and anticipated lawsuits and grievances?
>
> b. If you answered "yes" to Question 2a, did the conduct of defendants amount to an egregious abuse of power; that is, was it conduct which shocks the conscience?
>
> 3. a. Did defendant Bain pull plaintiff's

handcuffed arms and wrists through his cell door food slot on April 4, 1995 with the intent to injure or inflict pain?

b. If you answered "yes" to Question 3a, was the fact that plaintiff had previously filed grievances and lawsuits against the defendant or his colleague a substantial or motivating factor behind defendant Bain's action?

c. If you answered "yes" to both Question 3a and 3b, did defendant [Metzger] improperly and intentionally allow defendant Bain to injure plaintiff?

d. If you answered "yes" to Question 3c, was the fact that plaintiff had previously filed grievances and lawsuits against defendant or his colleague a substantial or motivating factor behind defendant [Metzger's] action?

e. If you answered "yes" to Questions 3a and 3b, did the conduct of defendants amount to an egregious abuse of power; that is, was it conduct which shocks the conscience? Answer as to defendant [Metzger] only if you also answered "yes" to Questions 3c and 3d.

f. If you answered "yes" to Question 3a, did plaintiff suffer physical injury and/or pain and distress as a result of that conduct?

(J.A. at 65-67). The jury answered "yes" only to Questions 1b and 1c.

[5] The First Amendment standard requires only that the plaintiff's protected conduct be a substantial motivating factor behind the defendants' action. **See *Zilich v. Longo*, *34 F.3d 359, 364 (6th Cir. 1994).***

[6] The Fourteenth Amendment substantive due process standard requires that the plaintiff's protected conduct be a substantial motivating factor behind the defendants' action, and that the defendants' action be shocking to the conscience. **See *McLaurin v. Cole*, *115 F.3d 408, 410 (6th Cir. 1997)*.**

[7] Even if we were to find Walker's claim properly before the Court, we would reject it on the merits. Assuming, **arguendo**, the district court erred in allowing the counsel to question Walker in this regard, Walker has failed to demonstrate that the error affected his substantial rights.

CONCURBY:
MARTHA CRAIG DAUGHTREY (In Part)

DISSENTBY:
MARTHA CRAIG DAUGHTREY (In Part)

DISSENT:

MARTHA CRAIG DAUGHTREY, Circuit Judge, concurring in part, dissenting in part. In ***Hadix v. Johnson***, *230 F.3d 840 (6th Cir. 2000)*, we found no constitutional deficiencies in the provisions of *42 U.S.C. § 1997e*(d)(3), the precursor to congressionally sanctioned denigration of prisoners filing civil rights actions. Today, we take the additional step of holding that prisoners, and persons attempting to assist them, are less worthy of basic constitutional protections than are unincarcerated civil rights litigants. In order to register my protest to this unfortunate ruling, I respectfully dissent from the majority's holding in Part II.A.2. of its opinion. In all other respects, however, I concur in the majority's judgment and analysis.

I.

In upholding the constitutionality of the fee cap provision of *42 U.S.C. § 1997e*(d)(2), the majority first assumes that the statutory restriction "neither involves a suspect classification nor infringes on the fundamental right of access

to the courts." Given the broad language with which the statute is written, I am constrained to agree with my colleagues on this point and thus apply deferential rational basis review to the plaintiff's constitutional challenge.

I take this opportunity, however, to point out that we, as a court and as a nation, would be naive to think that the statute did not have a disparate impact on suspect classes and on individuals exercising fundamental rights. The annals of human history are replete with accounts of atrocities committed against persons viewed as "different" by those individuals wielding political power and military might. Thus, it would be surprising indeed to find that American prisons were any more solicitous of differences in race, ethnicity, religion, or sexual orientation than is American society as a whole. Moreover, the demographic composition of this country's prison population makes it probable that civil rights claims are filed most often by members of groups deemed by society to be "minorities." I would expect, for example, that a statistically disproportionate number of allegations of constitutional violations in our country's prisons are filed by African-American males who, although constituting only six percent of the general population, account for almost half of the two million persons incarcerated in American jails and prisons. **See** Press Release, U.S. Department of Justice, Bureau of Judicial Statistics (Mar. 25, 2001), **available at** http://www.ojp.usdoj.gov/bjs/pub/press/pjim00pr.htm.; **Gustavo Capdevila, U.N. Hears Complaints of Justice System's Racism, african perspective (no. 47) (Sept. 2, 2000), at** http://www.africanperspective.com/html47/AfAmn.html.; **Michael B. Hancock and Peter C. Groff, From African Kingdoms To American Slave Plantations To American Prisons . . . It's Time To Act!, Univ. of Denver-Center for African American Policy (April 1999), available at** http://www.du.edu/caap/april1999.html. Similarly, it does not strain credulity to suppose that the vast majority of recorded acts of brutality, excessive force, retaliation, and deliberate indifference in our prisons are not committed against the powerful or "accepted" segments of society, but rather against racial and ethnic minorities, adherents of unpopular

or misunderstood religions, and individuals of "unaccepted" sexual orientations.

II.

Even applying the rational basis review employed by the majority, however, I am convinced that the portion of the Prison Litigation Reform Act challenged in this appeal cannot withstand probing, analytical scrutiny. Although rational basis review does afford a strong presumption of validity to the enactment at issue as long as "there is a rational relationship between the disparity of treatment and some legitimate government purpose," ***Hadix***, *230 F.3d at 843*, it "is not a rubber stamp of all legislative action, as discrimination that can **only** be viewed as arbitrary and irrational **will** violate the Equal Protection Clause." **Id.**

A. Reducing Frivolous Litigation

The first justification offered by the defendants and intervenors in this case as a basis for the disparity in treatment between prisoners and non-prisoners regarding attorneys' fees is Congress's desire to curb the rising tide of frivolous litigation initiated by incarcerated plaintiffs. Assuming that such an intent is indeed rational and justifiable, it is clear that there is no rational relationship between the disparate treatment mandated by the PLRA and the governmental interest to be fostered. Because attorneys' fees are awarded only to plaintiffs who can successfully demonstrate constitutional injury, "frivolous" filings are dismissed well before any calculation of attorneys' fees comes into play. Capping the amount of fees to be paid to a "prevailing party," therefore, bears absolutely no logical relationship to a desire to eliminate suits that by definition have no chance of succeeding. Reliance upon this line of argument for support for the challenged legislation is thus anything but rational.

Moreover, the 150% **attorneys' fee** cap does not affect the chance of the litigant's success on the merits of the suit and would not, therefore, enter into any calculus into which a hypothetical, incarcerated plaintiff would delve prior to lodging a complaint in federal court. "To be sure, Congress's

goal of reducing the number of prisoners who file frivolous lawsuits is a laudable goal. However, the attorney fees cap does not play any role in achieving this goal." ***Johnson v. Daley***, *117 F. Supp. 2d 889, 900 (W.D. Wisc. 2000).* **But see *Boivin v. Black***, *225 F.3d 36, 44-46 (1st Cir. 2000); **Madrid v. Gomez***, *190 F.3d 990, 996 (9th Cir. 1999).*

B. Deterring Trivial Or Inconsequential Suits

Curiously, one of the two rationales discussed in the majority opinion for limiting the total amount of a fee award in this case is the need to discourage lawsuits that, although meritorious, are considered "trivial" or not "significant." I find this argument advanced by the defendants and the intervenors both disconcerting and offensive. First, it is puzzling that the defendants and governmental intervenors can unabashedly term any vindication of constitutional rights "trivial" or "insignificant." To do so denigrates the sacrifices of millions of American men and women who have struggled and died, both at home and abroad, to protect the very freedoms guaranteed by our constitution. Second, the amount of a monetary damage award should not be equated with the significance of the rights secured or protected in any legal action. I am confident that even the majority would not confine the value of liberties such as a woman's right to vote or an African-American's right to sit at a lunch counter to some economic calculation. Similarly, for example, it would not be at all surprising in a prison setting that the value to an inmate of a prospective court ruling forbidding guards from beating him in retaliation for filing a successful grievance would far outweigh any minimal or nominal monetary amount associated with such a judicial order.

Finally, it would be foolhardy for us to think that the litigants filing § 1983 suits from prison would be less likely to seek vindication of perceived constitutional wrongs because of a congressionally-imposed limit on attorneys' fee awards. Almost all prisoner civil rights cases are now filed **pro se**, **pro bono**, or by dedicated public interest organizations whose representation decisions are not driven by the possibility of personal pecuniary gain. As recognized by the court in **Johnson v. Daley**:

> It is irrational to conclude that [a **pro se** prisoner] bases his decision [to file a civil rights claim] on the distant possibility that at some future time, his presently non-existent lawyer might recover a smaller rather than a larger amount of fees. . . . A prisoner may harbor hopes of a substantial monetary award (as do non-prisoner plaintiffs), but he has no reason to take into consideration the size of the fee award to his counsel. It is far more likely that the prisoner takes into consideration the immediate economic impact of giving up 20% of the greater of the average monthly balance in his account or the average monthly balance in his account for the six months preceding the filing of his complaint, **see** § 1915(b)(1)(A) and (B), as well as the non-economic consideration that if his suit is deemed frivolous he will be assessed one strike toward the maximum of three that will prevent him from filing any more suits without prepayment of the full filing fee except in the one situation in which he faces an imminent threat of serious physical injury. **See** § 1915(g).

117 F. Supp. 2d at 896. Thus, I cannot believe that the governmental interest in reducing the proliferation of so-called "trivial" suits in any way justifies, or is rationally related to, the draconian efforts to limit fees awarded in successful civil rights cases.

C. Reducing Intervention Of Federal Courts Into Prison Management

Equally unpersuasive is the intervenors' proffered justification that capping attorneys' fees awards will reduce federal court intrusions into daily prison management matters. Because most prisons are still arms of state government, the officials in charge of those institutions

remain subject to the rule of law as defined by the constitution and as interpreted by the courts. To the extent that litigants are able to establish constitutional violations by prison officials, the courts are duty-bound to rectify those transgressions. Any attempt, therefore, to restrict such relief unconstitutionally subverts bedrock principles lying at the core of our federal system of government.

Additionally, restricting the remuneration available to **attorneys** in no way limits the relief granted by a federal court to remedy a constitutional violation. Once again, the obvious lack of relationship between the result sought and the means chosen to gain that end ratifies the magistrate judge's determination that this ground is anything but a rational basis for the statutory enactment.

D. Preventing Windfall Fee Awards For Attorneys

The next rationalization offered by the defendants and the intervenors for the PLRA's fee cap is the need to prevent attorneys representing prisoners from collecting large fees for their services in cases in which they obtain only small or nominal damage awards. It is this proposed justification, however, that overlaps other arguments articulated by the defendants and intervenors and that crystallizes the exact reason why the provisions of § 1997e(d)(2), in contrast to the provisions of § 1997e(d)(3) at issue in **Hadix**, are so lacking in a rational basis.

Attorneys appointed to represent prisoners raising successful, non-frivolous § 1983 claims, like other attorneys seeking fees under *42 U.S.C. § 1988*, are not entitled to unlimited fee awards merely upon application for such remuneration. Instead, the judiciary has established a strict system of court oversight designed to tailor attorneys' fees to the merits of an individual case. Specifically, as explained by the United States Supreme Court:

> The very nature of recovery under § 1988 is designed to prevent any such "windfall" . . . [because] fee awards, properly calculated, by definition will represent the reasonable worth

> of services rendered in vindication of a plaintiff's civil rights claim. It is central to the awarding of attorney's fees under § 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case.

Blanchard v. Bergeron, *489 U.S. 87, 96, 103 L. Ed. 2d 67, 109 S. Ct. 939 (1989).*

In arriving at an appropriate fee award, the court must examine and balance numerous factors identified by the Supreme Court. In ***Hensley v. Eckerhart***, *461 U.S. 424, 430 n.3, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)*, the Court listed the following factors to consider:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Moreover, § 1997e(d)(1) itself requires that the amount of any fee awarded be "proportionately related to the court ordered relief for the violation," and "directly and reasonably incurred in enforcing the relief ordered for the violation." *42 U.S.C. § § 1997e*(d)(1)(B)(i) and (ii).

In **Hadix**, we upheld the PLRA's legislative determination of a reasonable **rate** for legal services for prisoner civil rights claims. Once that rate is established at a level that does not

constitute an unconstitutional taking of a lawyer's time and expertise, federal courts themselves are directed to ensure that attorneys' fee awards are commensurate with the effort expended and the relief obtained. In fact, district judges must undertake an evaluation of the appropriate time that should have been spent on such a case and must disallow any attempt to recover compensation for legal work not required to prevail on the claims asserted. Adherence to such sound legal principles prevents windfall awards without irrationally differentiating between successful prison civil rights cases and other civil rights cases. Consequently, this purported rationale for distinguishing between the two types of cases also fails to pass constitutional muster, even under a deferential rational basis analysis.

E. Protecting The Public Fisc

Without question, the desire to protect public funds is a laudable and legitimate goal of legislation. In fact, the majority seizes upon this rationale as its second justification for the purported legitimacy of the challenged legislation. As the magistrate judge in this matter indicated, however, the permissible objective of protecting the public fisc cannot be implemented "by arbitrarily singling out a particular class of persons to bear the entire burden of achieving that end." ***Walker v. Bain***, *65 F. Supp. 2d 591, 604 (E.D Mich. 1999).*

Obviously, eliminating **all** awards of attorneys fees in prison litigation would protect money in the public treasury. By enacting § 1988, however, Congress, in its wisdom, has chosen to award reasonable attorneys' fees to successful civil rights litigants. Invocation of the "protect the public fisc" mantra, by itself, thus adds little substance to the constitutional debate before us on this appeal. Once Congress has determined that fee awards are appropriate in § 1983 litigation, established judicial guidelines for determining responsible compensation for civil rights lawyers adequately protect the government's operating budget. To limit now such awards only for successful plaintiffs who happen to be incarcerated not only trivializes constitutional protections, but also discriminates in an irrational and unjust manner. **But see *Madrid***, *190 F.3d at 996.*

F. Limiting Disruption From Prison Litigation On Prison Operations

The defendants and intervenors also submit that limiting the attorneys' fees awarded in successful civil rights suits would enhance prison operations by increasing morale and minimizing the time prison officials must spend away from their jobs. To give any credence to such an argument, however, is literally tantamount to elevating absurdity to the level of rationality.

First, as noted previously, limiting attorneys' fees does nothing to impinge upon the protected right of access to the courts for redress of constitutional violations. Short of an improper restriction of such a freedom, prison officials will not be insulated by an attorneys' fee cap from demands on their time for administrative hearings, depositions, and court proceedings. In fact, even if all prisoner civil rights suits were prosecuted **pro se**, the relevant prison officials would still be required to devote time to defense of those actions. Second, because the award of attorneys' fees to other individuals has little impact on the prisoner actually initiating the suit, fee award restrictions would have no effect on the daily morale and interactions within the prison walls. Without a reasonable relationship between the statutory provision and the identified goal, the distinction drawn by the legislation between successful prisoner litigants and other successful civil rights litigants must be considered irrational. **See *City of Cleburne v. Cleburne Living Center*, *473 U.S. 432, 446, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)*** (attenuated relationship between challenged classification and asserted goal renders legislation arbitrary or irrational).

G. Curbing Prior Abuses Under § 1988

As a final attempt to justify the prisoner/non-prisoner distinction in the application of § 1997e(d)(2), the defendants and intervenors suggest that the cap on attorneys' fees in prisoner cases will curb abuses of § 1988 that have been prevalent in the past. In making that argument, however, they rely upon the perception that plaintiffs' attorneys are reaping windfall awards for minor monetary judgments. This

argument, as alluded to earlier, has two major flaws. First, the assertion fails to realize that vindication of constitutional rights is not always quantifiable solely by monetary damage awards. Furthermore, both the statute itself and Supreme Court jurisprudence require that the district court, in awarding attorneys' fees to a successful plaintiff, take numerous factors into consideration, not the least of which is the relief actually ordered. Given such realizations and given the protections afforded by judicial oversight of attorneys' fee awards, there is **no** rational basis for the distinctions drawn by the challenged statutory provision.

III.

In arguing that the provisions of § 1997e(d)(2) withstand rational basis review, the defendants and intervenors also contend that we are bound in this matter by our recent decision in **Hadix**. The majority also, although recognizing that **Hadix** dealt only with a challenge to the constitutionality of § 1997e(d)(3), now concludes that the same arguments that were accepted to justify (d)(3)'s cap on the **hourly rate** charged by attorneys representing prisoners in § 1983 actions hold true in this instance as well.

Without question, this court's "law of the circuit" doctrine precludes us from challenging in this appeal the efficacy of the **Hadix** decision. **See, e.g., *United States v. Seltzer***, *794 F.2d 1114, 1123 (6th Cir. 1986)* (only an **en banc** court may overrule circuit precedent, absent an intervening Supreme Court decision or change in the applicable law). I believe, however, that the provisions of § § 1997e(d)(2) and 1997e(d)(3) are radically different in their import and that the arguments supporting the rationality of one piece of the legislation do not necessarily apply in the other. As we noted in **Hadix**, Congress could rationally determine that funds in the public treasury could be saved if the calculation of fees awarded to prevailing attorneys began with a lower presumptively-proper hourly rate under § 1997e(d)(3). **See *Hadix***, *230 F.3d at 845-46*. The same logic does not extend to an analysis of the constitutionality of § 1997e(d)(2), however. Once the "customary fee" component of any proper attorneys' fee award under § 1988 is capped, the multi-

factored analysis to be undertaken by a district court ensures that only an appropriate fee amount will be awarded. The concerns and rationales that underpinned the **Hadix** decision are thus irrelevant to a constitutional analysis of § 1997e(d)(2).

IV.

The majority, while admitting "to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual . . . civil rights violations," in fact upholds such legislation through fear of turning the judiciary into a "superlegislature." I would suggest that the majority's vision in this matter has been inverted. Rather than the court being turned into a "superlegislature," the true concern here is that Congress has turned itself into a "superjudiciary," invading a province not reserved to it by our Constitution, impinging upon the court's responsibility to determine appropriate attorneys' fee awards according to well-established practices, and affording disparate treatment to different groups without even a rational basis for doing so. Consequently, I would hold that § 1997e(d)(2)'s cap on the attorney's fees to be awarded to counsel for a successful, incarcerated civil rights plaintiff violates Equal Protection guarantees by treating prisoner and non-prisoner litigants differently. I would thus affirm the judgment of the district court and now respectfully dissent from that portion of the majority opinion that does not do so.

CASE NO. 95-CV-76273-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

WILLIAM WALKER,
Plaintiff,

v.

THOMAS BAIN, and JANICE METZGER,
Defendants.

August 30, 1999, Decided

August 31, 1999, Filed

COUNSEL:
For WILLIAM H. WALKER, plaintiff: Deric J. Bomar, Dykema, Gossett, Detroit, MI.

For T. BAIN, METZGER, defendants: Jonathan C. Pierce, Michigan Department of Attorney General, Lansing, MI.

For T. BAIN, METZGER, defendants: Linda M. Olivieri, Michigan Department of Attorney General, Lansing, MI.

JUDGES:
PAUL J. KOMIVES, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY:
PAUL J. KOMIVES

OPINION:

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION AND ALLOWING DEFENDANTS ADDITIONAL TIME TO FILE A SUPPLEMENTAL RESPONSE

I. Introduction

This case has been the subject of numerous orders of the Court, and thus the facts need only be briefly restated here. Plaintiff William Walker, a state prisoner, commenced this action against defendants Thomas Bain and Janice Richter (also referred to as Janice Metzger), corrections officers, alleging that defendants retaliated against him for filing grievances and lawsuits. The case was tried to a jury before the undersigned pursuant to *28 U.S.C. § 636*(c). On April 23, 1999, the Court entered an amended judgment in favor of plaintiff and against defendants jointly and severally in the amount of $ 1.00; in favor of plaintiff and against defendant Bain in the amount of $ 300.00; and in favor of plaintiff and against defendant Richter in the amount of $ 125.00. On May 7, 1999, plaintiff filed his motion for attorney fees pursuant to *42 U.S.C. § 1988* and FED. R. CIV. P. 54(d). Plaintiff seeks $ 36,046.25 in fees. Defendants filed a response on June 9, 1999, arguing that, pursuant to section 803 of the Prison Litigation Reform Act (PLRA), plaintiff is entitled to a fee of only $ 629.00. Plaintiff filed a reply brief on July 16, 1999, arguing that the PLRA's attorney fee cap is unconstitutional both on vagueness and equal protection grounds.

On August 3, 1999, I filed an Opinion concluding that the PLRA fee cap codified at *42 U.S.C. § 1997e*(d)(2) (limiting an award of fees to 150% of the monetary judgment) violates the equal protection component of the Fifth Amendment Due Process Clause. I therefore ordered defendants to file a supplemental brief addressing the amount of fees to which plaintiff is entitled under the pre-PLRA standard. On August 20, 1999, defendants filed this motion for reconsideration pursuant to Local Rule 7.1(h). For the reasons that follow, defendants' motion will be denied.

II. Standard of Review

Although the Federal Rules of Civil Procedure do not provide for reconsideration of an order of the Court, the Local Rules of this Court provide that such a motion may be filed within 10 days after entry of the judgment or order which is the subject of the motion. *See* E.D. Mich. LR 7.1(g)(1). [1] Although a motion for reconsideration is

committed to the Court's discretion, as a general matter "the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by implication." E.D. Mich. LR 7.1(g)(3). Rather, to be entitled to relief the movant must demonstrate both (1) "a palpable defect by which the court and the parties have been misled" and (2) "that correcting the defect will result in a different disposition of the case." *Id.*

Notwithstanding this generally strict standard, I will give *de novo* consideration to the arguments raised by defendants because they did not have the opportunity to address the equal protection issue prior to my Order of August 3. Plaintiff first raised the argument in his reply brief, after the defendants had invoked § 1997e(d)(2) as a basis for limiting the amount of fees. Accordingly, it is appropriate to give full consideration to defendants' arguments, rather than viewing them under the more narrow "palpable defect" standard. Nevertheless, I find defendants' arguments unpersuasive. [2]

III. Analysis

In my previous Order, I concluded that the distinction drawn between prisoners and nonprisoners by the PLRA fee cap at issue here is not rationally related to any legitimate governmental interest, and thus does not survive rational basis review. In reaching this conclusion, I identified two possible legitimate governmental interests served by the provision: deterrence of frivolous filings and protection of the public fisc. [3] Relying on *Lindsey v. Normet, 405 U.S. 56, 76-78, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972)* and *Rinaldi v. Yeager, 384 U.S. 305, 310, 16 L. Ed. 2d 577, 86 S. Ct. 1497 (1966)*, I found that the statute is not rationally related to the first purpose because (a) it will have no effect on the initial filing of frivolous lawsuits, and (b) by its terms it applies only to meritorious claims. Similarly, I concluded that the distinction drawn between prisoners and nonprisoners by the fee cap provision is not rationally related to the goal of protecting the public fisc because Congress cannot arbitrarily single out a particular class of persons to bear the entire burden of achieving that end, again relying principally on *Rinaldi, 384 U.S. at 309-10.* Accordingly, I concluded that

the fee cap contained in § 1997e(d)(2) does not survive rational basis review, and thus violates the right of prisoners to the equal protection of the laws.

Defendants raise three arguments against this conclusion. First, defendants argue that the attorney fee limitation reflects Congress's reasonable judgment, based on twenty years of experience with the civil rights attorney fee provision, that the underlying purpose of the fee provision–encouraging civil rights suits which benefit the public–is not served by awarding large fees in prisoner cases. Second, defendants argue that the PLRA fee cap is a reasonable attempt by Congress to make attorney fee awards in prisoner cases proportional to the relief obtained. These first two arguments are essentially arguments that the fee cap provision is rationally related to legitimate governmental ends. Third, defendants argue that prisoners are not similarly situated as other civil rights litigants for purposes of the equal protection analysis.

Without rehashing entirely the analysis in my original Opinion, I conclude that these arguments are without merit. The argument that the fee cap is rationally related to the goal of deterring frivolous filings is untenable in light of the Supreme Court's rejection of similar claims in *Lindsey* and *Rinaldi*. Similarly, although protecting the public fisc is, as defendants argue, a legitimate public purpose, the Supreme Court's cases (again *Rinaldi* in particular) make clear that Congress cannot, consistent with equal protection, require a politically unpopular group–*i.e.*, prisoners–to bear the entire burden of that cost.

Defendants' argument essentially boils down to an assertion that the distinction between prisoner and nonprisoner civil rights litigants is permissible because the two groups are not similarly situated. Noting that the purpose of § 1988 is to promote the enforcement of civil rights for the benefit of the public, defendants argue that "the attorney fees limits embodied in the PLRA clearly are a congressional reaction to 20 years of prisoner litigation which has overburdened the courts, and drained public treasuries often with little benefit to the prisoner and little or no benefit to the

public." Def.s' Br. in Supp. of Mot. to Reconsider, at 4. Defendants also argue that prisoners and nonprisoners are not similarly situated because "few citizens who are not incarcerated avail themselves of the resources of the federal court to pursue claims warranting little or no damages, while prisoners bring a disproportionate number of these cases." *Id.* at 7. Further, defendants argue, "inmates utilize the courts more frequently and for more meritless and petty complaints than do other citizens" because "they have ample time to pursue frivolous and relatively petty grievances, they can enjoy the attention they receive from the court through sending and receiving mail, and they can look forward to a field trip away from the confines of prison to attend court sessions." *Id.*

Defendants' argument fails for two reasons. First, it relies primarily on the assertion that prisoners clog up the courts with frivolous litigation to a much greater extent than do nonprisoner civil rights litigants. While this may be true, it is also irrelevant. As explained briefly above and more fully in my initial Opinion, the attorney fee cap simply does not relate in any way to the initial filing of a civil rights lawsuit. Defendants' argument is simply their rational relationship argument in a different guise.

More fundamentally, defendants' argument fails because their "similarly situated" argument is based on too broad a comparison of prisoners and nonprisoners. It is true, as defendants note, that the equal protection component of the Fifth Amendment does not require that all persons be treated alike; rather, it requires only that all persons "similarly situated" to each other be treated alike. *See City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).* It is not necessary, however, that the two classes created by a statute be similarly situated in all respects. *See Samad v. Horn, 913 F. Supp. 373, 376 (E.D. Pa. 1995)* ("The defendants mistakenly interpret 'similarly situated' as 'identically situated.'"). Rather, "the similarly situated inquiry focuses on whether the [person challenging the governmental action is] similarly situated to another group *for purposes of the challenged government action.*" *Klinger v. Department of Corrections, 31 F.3d 727,*

731 (8th Cir. 1994) (emphasis added); *accord Reynolds v. Sims, 377 U.S. 533, 565, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964)* (equal protection requires "uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."); *Ohio v. Dollison, 194 U.S. 445, 447, 48 L. Ed. 1062, 24 S. Ct. 703 (1904)* (same). "Thus, . . . the similarly situated inquiry depends on what government action the plaintiffs are challenging." *Klinger, 31 F.3d at 731.* As another court has eloquently explained:

> The test is whether a prudent person, looking objectively at the [governmental actions], would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the "relevant aspects" are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.

Economic Opportunity Comm'n of Nassau County, Inc. v. County of Nassau, 47 F. Supp. 2d 353, 370 (E.D.N.Y. 1999) (quoting *Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989)); see also, Betts v. McCaughtry, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993)* ("To be 'similarly situated,' groups need not be identical in makeup, they need only share commonalities that merit similar treatment.").

Here, therefore, the question is not whether prisoners and nonprisoners are similarly situated in general, or even, as defendants pose the issue, whether prisoner and nonprisoner civil rights litigants are similar. [4] Rather, the issue is whether *successful* prisoner civil rights litigants are similarly situated with successful nonprisoner civil rights litigants. Phrased in this manner, it is clear that the prisoners and nonprisoners are similarly situated: a prisoner's increased incentive or ability to file a frivolous lawsuit does not, as has been explained, relate in any way to either § 1988 or § 1997e(d)(2). Indeed, I can conceive of no distinction between

these two classes for purposes of their entitlement to attorney fees under § 1988 (other than a desire to accord less favorable treatment to prisoners, which is impermissible), and defendants have offered none. Put another way, the disincentives of the fee cap provision do not inhibit the filing of frivolous lawsuits by prisoners; they *do* inhibit the willingness of lawyers to undertake the representation of plaintiffs who file non-frivolous cases. Accordingly, I reject defendants' argument that prisoners and non-prisoners are not similarly situated for purposes of plaintiff's equal protection challenge to § 1997e(d)(2).

As the Supreme Court recently explained (in a case striking down a statute under rational basis review):

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer v. Evans, 517 U.S. 620, 633, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996) (internal quotations and citations omitted). Here, Congress has singled out successful prisoner civil rights litigants and treated them differently from all other successful civil rights litigants, imposing special burdens on prisoners solely because they are prisoners. Because this distinction bears no rational relationship to any legitimate governmental interest, § 1997e(d)(2) violates plaintiff's right to the equal protection of the laws guaranteed by the Fifth Amendment.

IV. Order

Accordingly, it is ORDERED that defendants' motion for reconsideration is hereby DENIED. It is further ORDERED that defendants may file a supplemental response to plaintiff's motion for attorney fees addressing the amount of fees to which plaintiff is entitled under § 1988 notwithstanding the cap contained in § 1997e(d)(2) within 14 days of the date of this Order.

IT IS SO ORDERED.

PAUL J. KOMIVES

UNITED STATES MAGISTRATE JUDGE
Dated: Aug. 30, 1999

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' MOTION FOR RECONSIDERATION

On August 26, 1999, plaintiff filed this motion to strike defendants' motion for reconsideration of my August 3, 1999, opinion finding that the PLRA attorney fee cap in *42 U.S.C. § 1997e*(d)(2) is unconstitutional. By an Opinion and Order entered this date, I have denied defendants' motion for reconsideration on the merits. Accordingly, plaintiff's motion is hereby DENIED as moot.

IT IS SO ORDERED.

PAUL J. KOMIVES

UNITED STATES MAGISTRATE JUDGE
Dated: August 30, 1999

Footnotes

[1] Defendants also label their motion as one to alter or amend the judgment under Rule 59(e) and, alternatively, for relief from judgment under Rule 60. However, "Rules 59(e) and 60(b) . . . are not applicable here because they apply only to final judgments and orders." *New York v. Almy Bros., Inc., 1998 U.S. Dist. LEXIS 5469*, No. 90- *CV-818, 1998 WL 185541*, at *1 n.1 (N.D.N.Y. Apr. 15, 1998); *see also, Mallory v. Eyrich, 922 F.2d 1273, 1277 (6th Cir. 1991)* ("Rule 60(b) applies only to final judgments."); *WSM, Inc. v. Wheeler*

Media Servs., Inc., 810 F.2d 113, 115 n.2 (6th Cir. 1987) ("Rule 59(e) concerns only final judgments."). Under Rule 54, "'judgment' encompasses final judgments and appealable interlocutory orders." *Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 466 (9th Cir. 1989)* (discussing FED. R. CIV. P. 54(a)). My previous order was neither a final judgment nor an appealable interlocutory order, as it did not conclusively establish plaintiff's entitlement to any amount of fees, nor did it award any. Accordingly, Rules 59 and 60 are inapplicable here.

[2] Pursuant to Local Rule 7.1(h)(2), I conclude that neither oral argument nor a response by plaintiff is necessary to resolve defendants' motion.

[3] I also identified one other possible purpose, namely to deprive prisoners *qua* prisoners of the opportunity to obtain an award of attorney fees on the same basis as other civil rights litigants. However, I concluded that this purpose, if it exists, cannot support the constitutionality of the fee cap because a "bare congressional desire to harm a politically unpopular group'" is not a legitimate governmental interest. *Weinberger v. Salfi, 422 U.S. 749, 772, 45 L. Ed. 2d 522, 95 S. Ct. 2457 (1975)* (quoting *United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973)).*

[4] For example, prisoners and nonprisoners are not similarly situated for purposes of the filing fee provisions of the PLRA because, as defendants suggest, prisoners have more time and incentives to file civil rights suits than nonprisoners. *See Murray v. Dosal, 150 F.3d 814, 818 (8th Cir. 1998).* This does not, however, require a finding that prisoners and nonprisoners are not similarly situated for all purposes. As explained above, the "similarly situated" inquiry focuses on the relationship between the classes in light of the particular governmental action being challenged. Here, the incentives and ability to file numerous frivolous cases does not relate to the issue of attorney fees for successful litigants.

CASE NO. 95-CV-76273-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

WILLIAM WALKER,
Plaintiff,

v.

THOMAS BAIN, and JANICE METZGER,
Defendants.

August 3, 1999, Decided

August 3, 1999, Filed

COUNSEL:
For Plaintiff: DERIC J. BOMAR, DYKEMA GOSSETT, PLLC, DETROIT, MI.

For Defendant: LAMONT M. WALTON, LEO H. FRIEDMAN, ASSISTANT ATTORNEYS GENERAL, LANSING, MI.

JUDGES:
PAUL J. KOMIVES, UNITED STATES MAGISTRATE JUDGE.

OPINION BY:
PAUL J. KOMIVES

OPINION:

OPINION AND ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEY FEES AND ALLOWING DEFENDANTS ADDITIONAL TIME TO FILE A SUPPLEMENTAL RESPONSE

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I. Introduction

Plaintiff William Walker, a state prisoner, commenced this action against defendants Thomas Bain and Janice Richter (also referred to as Janice Metzger), corrections officers, alleging that defendants retaliated against him for filing grievances and lawsuits. The case was tried to a jury before the undersigned pursuant to *28 U.S.C. § 636*(c). On April 23, 1999, the Court entered an amended judgment in favor of plaintiff and against defendants jointly and severally in the amount of $ 1.00; in favor of plaintiff and against defendant Bain in the amount of $ 300.00; and in favor of plaintiff and against defendant Richter in the amount of $ 125.00.[1]

On May 7, 1999, plaintiff filed this motion for attorney fees[2] pursuant to *42 U.S.C. § 1988* and FED. R. CIV. P. 54(d). Plaintiff seeks $ 36,046.25 in fees. Defendants filed a response on June 9, 1999, arguing that, pursuant to section 803 of the Prison Litigation Reform Act (PLRA), plaintiff is entitled to a fee of only $ 629.00. Plaintiff filed a reply brief on July 16, 1999, arguing that the PLRA's attorney fee cap is unconstitutional both on vagueness and equal protection grounds. For the reasons that follow, I conclude that the provision of the PLRA limiting attorney fees to 150% of the monetary judgment awarded violates the right of prisoners to the equal protection of the laws, and thus is not applicable here.

II. Attorney Fees Under § 1988 & the PLRA Generally

Before addressing the constitutionality of the PLRA fee cap provision, it is appropriate to discuss, in some detail, the attorney fee structure of *42 U.S.C. § 1988*, both in general and as amended by the PLRA.

A. *Section 1988 Generally*

Section 1988 provides, in relevant part, that "in any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *42 U.S.C. § 1988*(b). The purpose of this provision "is to ensure effective access to the judicial for persons with civil rights claims, and to encourage litigation to enforce the provisions of the civil rights acts and constitutional civil rights provisions." *Hernandez v. Kalinowski, 146 F.3d 196, 199 (3d Cir. 1998); see also, Ortiz v. Regan, 980 F.2d 138, 140 (2d Cir. 1992).* Thus, although the decision to award fees is left to the trial court's broad discretion, which is given substantial deference by the appellate courts, *see Hadix v. Johnson, 65 F.3d 532, 534 (6th Cir. 1995)* ("*Hadix I*"), the court's discretion "must be guided by the statutory presumption that fees should be awarded to successful plaintiffs absent unusual circumstances." *Williams v. Hanover Housing Auth., 113 F.3d 1294, 1300 (1st Cir. 1997).* As the Supreme Court has

directed, "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." *Hensley v. Eckerhart, 461 U.S. 424, 429, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)* (internal quotation omitted).

Under the statute, a prevailing party is entitled to a "reasonable attorney's fee." In determining the reasonableness of a fee, a court generally applies the "lodestar" formula. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 563, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986).* Under the lodestar approach, the appropriate starting point "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).* This figure is strongly presumed to represent a reasonable fee, but the court may adjust it upward or downward based on other considerations. *Hensley, 461 U.S. at 434.* In determining the proper hourly rate under the lodestar approach, a court must try to determine the "prevailing market rates in the relevant community" for the service rendered. *Blum v. Stenson, 465 U.S. 886, 895-96 & n. 11, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984).* A number of factors may be considered by the court in making this determination. However, "the actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate." *National Ass'n of Concerned Veterans v. Secretary of Defense, 219 U.S. App. D.C. 94, 675 F.2d 1319, 1326 (D.C. Cir. 1982).* Probably the best evidence of a reasonable rate is the rate ordinarily charged by plaintiff's attorney. *675 F.2d at 1325; see also, Spell v. McDaniel, 824 F.2d 1380, 1402 (4th Cir. 1987); Detroit v. Grinnell Corp., 495 F.2d 448, 473 (2d Cir. 1974).*

B. *The PLRA Attorney Fee Provisions*

Although the lodestar method provides the correct approach for determining a reasonable attorney fee under § 1988 generally, the amount which may be awarded in a case brought by a prisoner is now capped. Specifically, both the

availability of fees and their amount have been restricted by section 803 of the PLRA, which amended *42 U.S.C. § 1997e* to provide, in relevant part, as follows:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that–
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

42 U.S.C. § 1997e(d).

Few courts have considered the substance of these provisions, addressing rather the preliminary question of whether these provisions apply to cases pending at the time the PLRA was enacted. Specifically, no court has examined the framework for analyzing fees requests. However, after harmonizing the general approach of § 1988 with the more specific requirements of § 1997e(d), and engaging in a bit of streamlining, I conclude that the following approach is proper:

> . First, the court should determine whether plaintiff is eligible for an award of attorney fees by determining whether he is a prevailing party under § 1988.
>
> . Second, the court should calculate the lodestar method in the ordinary fashion. In making this calculation, however, the court must: (a) limit the hourly rate sought to the lesser of the prevailing market rate (normally applied under § 1988) or the maximum provided in § 1997e(d)(3); and (b) limit the hours sought to only those hours which were "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" as required by § 1997e(1)(A).
>
> . Third, the court should determine whether the amount of the fee determined from the first two steps is proportionate to the relief obtained under § 1997e(d)(1)(B).
>
> . Fourth, if a monetary judgment was awarded the court must, in accordance with § 1997e(d)(2), apply some portion of the judgment, not greater than 25%, to satisfy the attorney fee award and limit the total award to 150% of the judgment.

Cf. Clark v. Phillips, 965 F. Supp. 331, 333-38 (N.D.N.Y. 1997) (employing a similar analysis).

Plaintiff contends that the last step of the above analysis is not dictated by the statute. In his view:

> Given Congress' failure to indicate that "no award" of attorney fees should be paid by a defendant where the award of attorney fees is greater than 150 percent of the judgment, the more reasonable interpretation is that defendant shall pay the entire excess of any award of attorney fees, where the fee award is not greater than 150 percent of the judgment. The "excess" portion of § 1997e(d)(2) simply does not apply to the facts of this case where an award of attorney fees is greater than 150 percent. If Congress intended the PLRA to apply to such a situation, it would have explicitly indicated it in the provision. Because the "excess" portion of § 1997e(d)(2) does not apply to this case, Defendants remain responsible for a reasonable attorney fee, after 25 percent of the Judgment is applied to satisfy the attorney fee award.

Pl.'s Reply Br., at 3-4. Plaintiff's argument misses the mark. The provision clearly contains two limits on an attorney fee award: (1) a limit on the amount of the judgment which can be used to satisfy an attorney fee award; and (2) a limit on the amount of an award for which a defendant may be liable. Under the plain language of the statute a defendant is liable for only the difference between the 150% limit and the amount of the judgment used to satisfy the fee award. It is true, as plaintiff suggests, that nothing in the provision caps the amount of the award which the Court can make. Thus, for example, a court could theoretically make an award of fees that is 1000% of the judgment. However, there are only two sources from which such an award can be paid: the judgment and the defendants. The amount that may be taken from each of these sources is limited, the first to 25% of the judgment

and the latter to 150% of the judgment. Thus, while nothing in the statute would prevent a court from making an award of more than 150% of the judgment in theory, in practice such an award would be meaningless. Plaintiff's theory would render the 150% cap meaningless, and accordingly must be rejected.

C. *Application to Pending Cases Generally*

As discussed above, section 803 of the PLRA limits the amount of attorney fees which may be awarded a prevailing plaintiff in a § 1983 suit where the plaintiff is a prisoner. Although the Sixth Circuit had ruled that this provision does not apply to any services performed on cases filed prior to the effective date of the Act (April 26, 1996), regardless of the date the services were rendered, *see Hadix v. Johnson, 143 F.3d 246, 250-56 (6th Cir. 1998)* ("*Hadix II*"), that decision has just been reversed, in relevant part, by the Supreme Court. In *Martin v. Hadix, 527 U.S. 343, 144 L. Ed. 2d 347, 119 S. Ct. 1998, 1999 WL 401324 (1999).* In *Martin*, the Supreme Court agreed with the Sixth Circuit that the PLRA cap does not apply to services which were performed by an attorney prior to the effective date of the PLRA. *See id.* at *10-*11. However, the Court also concluded, contrary to the Sixth Circuit, that the fee cap applies to services provided after the effective date of the Act, even if the attorney had been retained and the case filed prior to the effective date. *Id.* at *11-*12. Because all of the work performed by plaintiff's attorney in this matter post-dates the enactment of the PLRA, *see* Pl.'s Mot. for Attorney Fees, Ex. C, plaintiff's request for fees is governed by section 803 of the PLRA, to the extent that it is constitutionally valid.

III. Plaintiff's Vagueness Challenge

Plaintiff argues in his reply that, to apply this provision in the manner suggested by defendants would be unconstitutional for two reasons: (1) the provision is unconstitutionally vague; and (2) it violates the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff's vagueness argument is premised on his contention that the 150% cap contained in § 1997e(d)(2) is unclear. As explained in part II, *supra*, I reject this argument,

and thus plaintiff's vagueness challenge must fail. Further, the void-for-vagueness doctrine is inapplicable to § 1997e(d)(2). As plaintiff correctly notes, a statute may be unconstitutionally vague, and thus violate due process, if "men of common intelligence must necessarily guess at its meaning and differ as to its application[.]" *Connally v. General Constr. Co., 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926).* However, as the Supreme Court has explained, "the essential purpose of 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan v. De George, 341 U.S. 223, 230, 71 S. Ct. 703, 95 L. Ed. 886 (1951).* Thus, "the doctrine's chief application is in respect to criminal legislation" and legislation impinging First Amendment rights. *Lopez-Lopez v. Aran, 844 F.2d 898, 901 (1st Cir. 1988); see also, Waterman v. Farmer, 183 F.3d 208, 212 n.4, 1999 WL 437285,* at *12 n.4 (3d Cir. June 30, 1999). In short, "the void for vagueness doctrine [has] little or no application outside of the first amendment or criminal contexts." *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers, 484 F. Supp. 1008, 1014 (N.D. Ga. 1979).*[3]

As the Supreme Court has repeatedly explained, the purpose of the vagueness doctrine is to fairly apprise individuals of the criminal, and occasionally civil, consequences of their actions, so that they may conform their conduct to those standards. *See Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); Jordan, 341 U.S. at 230.* Here, § 1997e(d)(2) does not proscribe any conduct; rather, it governs the standards a court must use in imposing attorney fees in a particular class of cases. Essentially, plaintiff's argument is that the law is vague because it requires the Court to engage in statutory interpretation. However,

> the very business of courts is interpretation of statutes. Were the mere existence of uncertainty as to a law's construction or application to mean the law was fatally vague, there would be very few laws left on the books. Where an ordinary civil statute can

> reasonably be interpreted and limited by judicial construction, it will withstand a vagueness challenge.

Exxon Corp., 484 F. Supp. at 1015. Here, § 1997e(d)(2) is sufficiently clear to allow the Court to determine the standards governing an award of fees in this case. Accordingly, I conclude that § 1997e(d)(2) is not unconstitutionally vague.

IV. Plaintiff's Equal Protection Challenge

A. *Generally*

Second, plaintiff argues that section 803 violates the Equal Protection Clause[4] because it discriminates between prisoners and non-prisoners. Plaintiff argues that heightened scrutiny is appropriate "because it relates to an essential right – the right to counsel," Pl.'s Reply Br., at 4, and that even if rational basis review is applied the provision fails. I conclude that heightened scrutiny is not appropriate. As the Supreme Court's cases make clear, strict scrutiny is applicable only where the regulation being challenged "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution[.]" *San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 17, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); see also, Nordlinger v. Hahn, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978).* The first category is inapplicable here because "indigent prisoners are not a suspect class." *Rodriguez v. Cook, 169 F.3d 1176, 1179 (9th Cir. 1998)* (citing *Harris v. McRae, 448 U.S. 297, 323, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980)); accord Wilson v. Yaklich, 148 F.3d 596, 604 (6th Cir. 1998)* (citing *Harris, supra); Hampton v. Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997).* Nor is a fundamental right implicated by § 1997e(d)(2), contrary to plaintiff's argument. Although there is fundamental constitutional right to counsel in criminal cases, *see* U.S. CONST. amend. VI, there is "no constitutional

right to appointed counsel in a civil case." *Abdur-Rahman v. Michigan Dep't of Corrections, 65 F.3d 489, 492 (6th Cir. 1995)*. Accordingly, because § 1997e(d)(2) burdens neither a suspect class of persons nor a fundamental right, it is subject only to rational basis review.

Nevertheless, I conclude that § 1997e(d)(2) is unconstitutional even under the deferential rational basis review. Under this review, a law is valid if it "rationally furthers a legitimate [governmental] interest." *Nordlinger, 505 U.S. at 10; accord San Antonio Sch. Dist., 411 U.S. at 17.* This test would require me to reject plaintiff's equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe, 509 U.S. 312, 320, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993)* (internal quotations omitted). Although this is a deferential standard, it "is not a toothless one." *Mathews v. Lucas, 427 U.S. 495, 510, 49 L. Ed. 2d 651, 96 S. Ct. 2755 (1976).* As the Supreme Court has consistently held, "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 83, 100 L. Ed. 2d 62, 108 S. Ct. 1645 (1988);* Thus, a law will fail under rational basis review if "'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [legislature's] actions were irrational.'" *Gregory v. Ashcroft, 501 U.S. 452, 471, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)* (quoting *Vance v. Bradley, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979)); accord City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)* (government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). Further, the question is not whether there is a rational basis for a law in general; rather, the question is "whether there is an appropriate governmental interest suitably furthered by the differential treatment."

Police Dep't v. Mosley, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972).

B. *Illegitimate Governmental Interests*

Before addressing the legitimate governmental interests which may underlie the distinction between prisoners and nonprisoners embodied in § 1997e(d)(2), I pause to note that there is one conceivable purpose underlying the statute which is not legitimate: to deprive prisoners *qua* prisoners of the opportunity to obtain an award of attorney fees on the same basis as other civil rights litigants. If such a purpose underlies § 1997e(d)(2), it would not reflect a legitimate governmental interest. As the Supreme Court has made clear, a "'bare congressional desire to harm a politically unpopular group'" is not a legitimate state interest. *Weinberger v. Salfi, 422 U.S. 749, 772, 45 L. Ed. 2d 522, 95 S. Ct. 2457 (1975)* (quoting *United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973)); accord City of Cleburne, 473 U.S. at 446-47.* Indeed, this reasoning is particularly appropriate here, as prisoners are not only a politically unpopular group, but a group which has no recourse to the legislative process to overturn disadvantageous laws. *See McCarthy v. Madigan, 503 U.S. 140, 153, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992)* (quoting *Yick Wo v. Hopkins, 118 U.S. 356, 370, 30 L. Ed. 220, 6 S. Ct. 1064 (1886))* ("Because a prisoner is ordinarily divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.'").

Nor can such an interest be legitimatized by arguing that prisoners and nonprisoners are not similarly situated for equal protection purposes, at least as relates to the statute at issue here. *See City of Cleburne, 473 U.S. at 439* (equal protection requires that all persons "similarly situated" be treated alike). While prisoners and nonprisoners are not similarly situated in many respects, for purposes of pursing civil rights litigation the two groups are similarly situated. As the Supreme Court has recognized, "'lawful incarceration brings about the necessary withdrawal or limitation of many

privileges and rights.[.]'" *Bell v. Wolfish, 441 U.S. 520, 545-46, 60 L. Ed. 2d 447, 99 S. Ct. 1861* (quoting *Price v. Johnston, 334 U.S. 266, 285, 92 L. Ed. 1356, 68 S. Ct. 1049 (1948)).* However, this retraction is only "'justified by the considerations underlying our penal system,'" *Bell, 441 U.S. at 546* (quoting *Price, 334 U.S. at 285)*, and thus extends only so far as the right or privilege is inconsistent with either "the fact of confinement [or] the legitimate goals and policies of the penal institution," *id.*, namely "deterrence of crime, rehabilitation of prisoners, and institutional security."*O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987).* These considerations do not justify treating prisoners, in general, differently in terms of their ability to pursue litigation, or of their entitlement to remedies afforded other litigants. *See Nicholas v. Riley, 874 F. Supp. 10, 12 (D.D.C. 1995)* ("So far as treating prisoners differently than nonprisoners is concerned, . . . discrimination on account of Plaintiff's status *qua* prisoner merits rational basis review."). Thus, I must examine any legitimate governmental interests underlying the fee provision, and determine whether the distinction drawn between prisoners and nonprisoners is rationally related to those interests. *See id.* (citing *Moran v. United States, 18 F.3d 412, 413 (7th Cir. 1994); see also, Mosley, 408 U.S. at 95* (question in equal protection case is "whether there is an appropriate governmental interest suitably furthered by the differential treatment.")

C. *Legitimate Governmental Interests*

As explained above, I must first identify the purposes underlying the distinction drawn by § 1997e(d)(2) between prisoners and non-prisoners pursuing civil rights claims in the federal courts, and determine whether these interests are legitimate. In making this inquiry, it is not necessary that Congress "actually articulate at any time the purpose or rationale supporting its classification," *Nordlinger, 505 U.S. at 15*, and I must attempt to identify any possible interests served by the classification. This does not require me to engage in flights of fancy; rational basis review "does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental

decisionmaker." *Id.* (quoting *Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528-29, 3 L. Ed. 2d 480, 79 S. Ct. 437 (1959)); see also, Heller, 509 U.S. at 318-19* ("The standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.").

There is no legislative history which specifically relates to the attorney fee provision. However, the legislative history of the PLRA in general makes it clear that the primary purpose of the Act was to discourage frivolous prisoner lawsuits. As the Sixth Circuit has explained, "the legislation was aimed at the skyrocketing number of claims filed by prisoners--many of which are meritless--and the corresponding burdens those filings have placed on the federal courts." *Hampton, 106 F.3d at 1286.* The Sixth Circuit has recognized that this is a legitimate governmental purpose, *see Wilson, 148 F.3d at 604* (quoting *Hampton, 106 F.3d at 1287)* ("'Deterring frivolous prisoner filings in the federal courts falls within the realm of Congress's legitimate interests.'"), and plaintiff does not dispute this point.

Having examined the text of the statute and the underlying legislative history, I can envision only one other purpose for the attorney fee limitation, namely, to protect the public fisc from large attorney fee awards in prisoner civil rights lawsuits. This, too, is a legitimate governmental purpose. *See Shapiro v. Thompson, 394 U.S. 618, 633, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969).*

D. *Rational Relationship Between Interests and Distinction*

Having identified two interests conceivably underlying § 1997e(d)(2) and determined that these interests are legitimate, my next task is to determine whether the distinction between prisoners and non-prisoners embodied in § 1997e(d)(2) is rationally related to the achievement of these interests. Importantly, I again emphasize that the question here is not only whether the limitation on attorney fees in general serves these interests; it is also whether the distinction drawn between prisoners and non-prisoners is rationally related to these governmental interests. *See Mosley, 408 U.S. at 95.* After extensively considering the law in this area, I conclude that there is no rational relationship between

the distinction drawn by § 1997e(d)(2) and the purported governmental interests.

1. *Deterring Frivolous Fillings*

The first conceivable governmental interest underlying § 1997e(d)(2) is the interest which underlies the PLRA in general: deterrence of frivolous filings by prisoners. Any relationship between an award of attorney fees to successful prisoner plaintiffs and the initial filing of frivolous civil rights suits is, at best, so attenuated as to be irrational. *See City of Cleburne, 473 U.S. at 446.* Nearly every prisoner civil rights suit is filed by a prisoner proceeding *pro se*. As in this case, it is generally only after the case has been filed and has survived both an initial screening for frivolousness *see 28 U.S.C. § 1915A*, and a summary judgment motion, making it clear that the case will proceed to trial, that a court will assist the prisoner in obtaining counsel.

The Supreme Court's decision in *Lindsey v. Normet, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972)*, is persuasive, In *Lindsey*, the Court struck down, under rational basis review, an Oregon statute which required a defendant in an action brought under the state's forcible entry and wrongful detainer statute (FED statute) who wished to appeal to file a double-bond. The Court found that this provision, by imposing a requirement not imposed on other civil litigants wishing to appeal, "imposes additional requirements that . . . bear no reasonable relationship to any valid state objective and that arbitrarily discriminates against tenants appealing from adverse decisions in FED actions." *Id. at 76.* Specifically, as relevant here, the Court rejected the state's argument that the double-bond requirement reduced frivolous appeals. The Court reasoned: "The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but allows meritless appeals by others who can afford the bond." *Id. at 78; see also, Rinaldi v. Yeager, 384 U.S. 305, 310, 16 L. Ed. 2d 577, 86 S. Ct. 1497 (1966)* (law requiring those sentenced to prison to reimburse the state for the cost of transcript used in appeal, but not requiring such reimbursement by persons

sentenced to probation or a fine, violated equal protection; there was no rational relationship between distinction drawn by statute and deterrence of frivolous appeals.

For similar reasons, the fee cap contained in § 1997e(d)(2) is not rationally related to the purported goal of reducing frivolous § 1983 filings. Indeed, the connection is even more tenuous here than in *Lindsey* because, unlike the statute in *Lindsey* which brought at least some frivolous appeals within its sweep, by its terms attorney fees under § 1988 are available only to successful plaintiffs, and therefore § 1997e(d)(2) targets only successful claims. Thus, if anything, § 1997e(d)(2) bears an even more tenuous relationship to the goal of deterring frivolous filings than the double-bond requirement in *Lindsey*, and under the reasoning of *Lindsey* I must find that the fee cap fails to satisfy rational basis review, at least insofar as the purported interest in deterring frivolous filings is concerned.

In short, looking to "the realities of the subject addressed by the legislation," *Heller, 509 U.S. at 318-19*, it simply cannot be contended that the attorney fee cap has any bearing on the filing of frivolous cases. The cases subject to the cap are invariably filed by prisoners themselves without the assistance of an attorney; it is untenable to suppose that a prisoner would be deterred from filing a frivolous lawsuit simply because, if he manages to make it that far, he may have a more difficult time obtaining counsel willing to take his case to trial. If anything, this is the only purpose which is served by the cap: limiting the number of attorneys willing to represent prisoners because of the reduced financial incentives for doing so. Accordingly, I conclude that § 1997e(d)(2) is not rationally related to the goal of deterring frivolous lawsuits brought under § 1983.[5]

2. *Protecting the Public Fisc*

It may be that § 1997e(d)(2) also serves the legitimate governmental interest of protecting the public fisc. By its terms, § 1983 authorizes suits only against persons acting under color of state law. Except in the relatively rare situations in which private persons are deemed state actors, this means that damages in § 1983 actions and attorney fees

awarded under § 1988 will be assessed against public officials and, by extension, the public treasury of the states.[6] While this is a legitimate purpose, however, the distinction between prisoners and nonprisoners drawn by § 1997e(d)(2) is not rationally related to achieving this purpose. As both the Supreme Court and the lowers courts have repeatedly observed, in cases ranging from rational basis review to strict scrutiny: "The protection of the public purse is a valid, indeed necessary, purpose relevant to all public programs. But it may not be accomplished by arbitrarily singling out a particular class of persons to bear the entire burden of achieving that end." *Westberry v. Fisher, 297 F. Supp. 1109, 1115 (D. Me. 1969)* (applying rational basis review) (also citing cases for proposition that "the courts have repeatedly stated that conservation of the public funds does not permit disparate treatment of persons similarly situated."); *see also, Plyler v. Doe, 457 U.S. 202, 227, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)* (intermediate scrutiny); *Shapiro v. Thompson, 394 U.S. 618, 633, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)* (strict scrutiny); *Rinaldi, 384 U.S. at 309* (rational basis); *Silbowitz v. Secretary of Health, Educ. & Welfare, 397 F. Supp. 862, 867 (S.D. Fla. 1975), summarily aff'd sub nom. Califano v. Silbowitz, 430 U.S. 924, 51 L. Ed. 2d 768, 97 S. Ct. 1539 (1977)* (rational basis).[7]

The Supreme Court's decision in *Rinaldi, supra,* is on point. In that case, the Court considered the constitutionality of a New Jersey statute which required criminal defendants sentenced to a prison term to reimburse the county for the cost of any transcript provided for use in their appeals. The statute did not apply, however, to those defendants who were sentenced to probation or a fine, but not a prison term. *See Rinaldi, 384 U.S. at 307.* Applying rational basis review, the Court concluded that the distinction drawn between defendants sentenced to prison and those sentenced to a fine was not related to the underlying purpose of the statute, *i.e.*, reimbursing the state for appeal expenses incurred by unsuccessful appellants. The Court reasoned:

> We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefitted from county expenditures. To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination. Those appellants who have been sentenced only to pay a fine have been accorded the same benefit by the county–a transcript used in an unsuccessful appeal, and all that distinguishes them from their institutionalized counterparts is the nature of the penalty attached to the offense committed. There is no defensible interest served by focusing on that distinction as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision. Likewise, an appellant subject only to a suspended sentence or probation is likely to differ from an inmate only in the extent of his criminal record. That, too, is a trait unrelated to the fiscal objective of the statute.

Rinaldi, 384 U.S. at 309-10. Similarly, here "there is no defensible interest served by focusing on the distinction" between prisoners and nonprisoners, "since it bears no relationship whatever to the purpose of" either the attorney fee provision of § 1988 or the cap on such fees provided by § 1997e(d)(2). The only manner in which the distinction between prisoners and nonprisoners relates to the goal of protecting the public fisc is by making prisoners (or the *pro bono* attorney) bear the entire extent of that burden for no other reason than the fact that they are prisoners (or attorneys who have undertaken to represent prisoners). Such an arbitrary discrimination, as the cases discussed above demonstrate, is not a permissible means of guarding the state's purse. Accordingly, I conclude that there is no rational

relationship between the distinction made by § 1997e(d)(2) and the purported goal of protecting the public fisc.

Congress may have felt displeasure at the refusal of the Supreme Court to incorporate a proportionality factor into the calculus used to determine a § 1988 attorney fee award. *See City of Riverside v. Rivera*, *477 U.S. 561, 574-81, 91 L. Ed. 2d 466, 106 S. Ct. 2686 (1986)*. I do not question the authority of Congress to amend § 1988 to limit the amount of attorney fees available in all civil rights cases. Section 1988 itself is a benefit conferred upon civil rights litigants by Congress to encourage the private enforcement of civil rights by means of lawsuits. As a general principle, "what Congress giveth, . . . it can also taketh away." *Burks v. American River Transp. Co., 679 F.2d 69, 76 (5th Cir. Unit A 1982); accord Westvaco Corp. v. United States, 225 Ct. Cl. 436, 639 F.2d 700, 709 (Ct. Cl. 1980); In re Savage, 67 B.R. 700, 708 (D.R.I. 1986)*. Congress may do so, however, only "so long as it does not act irrationally." *Savage, 67 B.R. at 708*. As the Supreme Court's equal protection cases in the area make clear, when Congress arbitrarily saddles one group with the burden of protecting the public fisc, it acts irrationally.

E. *Conclusion*

Although § 1997e(d)(2) does not burden a fundamental right, it does erect a hurdle for prisoners but not for other civil rights litigants: it will be more difficult for prisoners to obtain counsel willing to pursue civil rights claims, given the limited fees available to such attorneys even if they prevail. And, by the plain language of both § 1988 and § 1997e(d)(2), this disadvantage applies only to prisoners who have meritorious claims. In this respect, the reasoning of the Massachusetts Supreme Court is particularly poignant:

> It is an essential element of equal protection of the laws that each person shall possess the unhampered right to assert in the courts his rights, without discrimination, by the same processes against those who wrong him as are open to every other person. The courts must

> be open to all upon the same terms. No obstacles can be thrown in the way of some which are not interposed in the path of others. Recourse to the law by all alike without partiality or favor, for the vindication of rights and the redress of wrongs, is essentially to equality before the law.

Bogni v. Perotti, 224 Mass. 152, 112 N.E. 853, 856 (Mass. 1916); cf. Procunier v. Martinez, 416 U.S. 396, 419, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974) ("Regulations and practices that unjustifiably obstruct the availability of professional representation . . . are invalid.").

Because the provision of § 1997e(d)(2) limiting an attorney fee award under *42 U.S.C. § 1983* to 150% of the judgment awarded in prisoner cases is not rationally related to any legitimate governmental interest, I conclude that the provision violates the equal protection component of the Fifth Amendment. Accordingly, plaintiff's entitlement to attorney fees will be determined without reference to that provision.[8]

V. Order

Defendants did not argue in their response that plaintiff is not a prevailing party, nor did they attack the reasonableness of the hours and rate claimed by counsel for plaintiff in his detailed billing summary. Presumably, defendants viewed these issues as essentially irrelevant in light of the fee cap provision of § 1997e(d)(2). Fairness dictates that defendants have the opportunity to respond to the fees claimed by plaintiff under the ordinary lodestar standards governing § 1988 fee claims generally. Accordingly, it is hereby ORDERED that defendants may file a response addressing this issue within 14 days of the date of this Order.

IT IS SO ORDERED.

PAUL J. KOMIVES

UNITED STATES MAGISTRATE JUDGE

Dated: Aug. 3, 1999

Footnotes

[1] The procedural history leading to the entry of the amended judgment is detailed in my Opinion and Order, entered this date, denying plaintiff's motion for partial new trial.

[2] As the Sixth Circuit noted in *Stallworth v. Greater Cleveland Reg'l Transit Auth., 105 F.3d 252, 253-54 n.1 (6th Cir. 1997)*, a threshold matter of style and usage is presented by plaintiff's motion. It is not clear whether it is more proper to refer to "attorney fees," "attorneys fees," "attorney's fees," or attorneys' fees." Noting that statutes and court rules use these forms interchangeably, the court concluded that "in line with the statute we are interpreting, we will use 'attorney fees' in this case, except where quoting other authorities." *Id.* In *Ridder v. City of Springfield, 109 F.3d 288 (6th Cir. 1997)*, the court decided to use "attorney fees" even though the statute and rule at issue used different terminology. The court reasoned: "Finding uniform terminology advantageous, we shall adhere to Stallworth's use of 'attorney fees.'" *Ridder, 109 F.3d at 290 n.1.* In light of this precedent, this Opinion will use "attorney fees" except where quoting other authorities.

[3] A search of the Westlaw database yields 91 Supreme Court cases in which the word "void" appears in the same sentences as "vague" or "vagueness." Fifty-one of these cases substantively addressed the vagueness issue, either in the principal opinion or in a concurring or dissenting opinion. Of these, only four cases arose outside the criminal law or First Amendment context. In each case, however, the context was sufficiently similar to the concerns underlying application of the vagueness doctrine in the criminal and First Amendment contexts to justify application of the doctrine. *See Village of Hoffman Estates v. Flipside, 455 U.S. 489, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)* (ordinance which, although not criminal, imposed civil fines); *City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 71 L. Ed. 2d 152, 102 S. Ct. 1070*

(1983) (ordinance regulation licenses for operating coin-operated amusement establishments); *Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 18 L. Ed. 2d 661, 87 S. Ct. 1563 (1967)* (regulation which would result in deportation); *Jordan v. De George, 341 U.S. 223, 71 S. Ct. 703, 95 L. Ed. 886 (1951)* (same). In each of these four cases, although the Court addressed the vagueness issue, the Court upheld that law at issue.

[4] Actually, the Equal Protection Clause of the Fourteenth Amendment has no application here because, by its terms, the Fourteenth Amendment applies only to the states, and the PLRA is a federal enactment. However, the Supreme Court has held that the Due Process Clause of the Fifth Amendment, which is applicable to the federal government, contains an equal protection component identical to the Fourteenth Amendment. *See Mathews v. De Castro, 429 U.S. 181, 182 n.1, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976)* (citing *Weinberger v. Salfi, 422 U.S. 749, 768-770, 45 L. Ed. 2d 522, 95 S. Ct. 2457 (1975)); Bolling v. Sharpe, 347 U.S. 497, 499, 98 L. Ed. 884, 74 S. Ct. 693 (1954).*

[5] There is no court opinion of any precedential weight addressing the constitutionality, on equal protection grounds, of § 1997e(d)(2). An exhaustive search of the Westlaw database revealed only three cases addressing the issue whatsoever. The first is an unpublished district court decision, *Collins v. Algarin, 1998 U.S. Dist. LEXIS 83, No. 95-4220, 1998 WL 10234*, at *9 (E.D. Pa. Jan. 9, 1998), which upheld the provision. In the second case addressing this issue, the Third Circuit, sitting *en banc*, affirmed this decision by an equally divided court. *See Collins v. Montgomery County Bd. of Prison Inspectors, 176 F.3d 679, 686 (3d Cir. 1999)* (en banc). Under the Third Circuit's law, this decision is entitled to no weight. *See Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482, 1501 (3d Cir. 1985), vacated on other grounds, 475 U.S. 1105 (1986).* Further, much of the district court's decision in *Collins* is dicta, as Judge Shapiro noted that the total amount which the court would award

"may not be substantially less than the amount awarded by the court prior to enactment of the restrictions imposed by the PLRA." *Collins, 1998 WL 10234*, at *10. Finally, the Ninth Circuit reached the same conclusion in *Madrid v. Gomez, 150 F.3d 1030, 1041-42 (9th Cir. 1998)*, although that opinion was subsequently withdrawn. *See F.3d , 1999 WL 454882* (9th Cir. July 7, 1999). Although both the district court in *Collins* and the Ninth Circuit in *Madrid* concluded that § 1997e(d)(2) is rationally related to the goal of deterring frivolous filings, I find those decisions unpersuasive, even if they possessed some precedential weight. The courts in these cases reached this result in a conclusory fashion, failing to explain how the attorney fee provision is in any manner related to the filing of frivolous cases As explained above, I conclude that there is no such relationship, and thus disagree with the conclusion reached by these courts.

The numerous cases rejecting equal protection challenges to the filing fee provisions of the PLRA are inapposite. There is a rational relationship between the obligation to pay a filing fee and a prisoner's decision to file a frivolous case. The filing fee obligation obviously creates a financial disincentive which requires a prisoner to "think twice" before filing a frivolous claim. *See Hampton, 106 F.3d at 1286.* As discussed above, the attorney fee provision creates no such disincentive.

[6] However, neither the state, nor a state agency, nor a state official sued in his or official capacity, is a person as that term is used in § 1983. *See Will v. Michigan Dep't of State Police, 491 U.S. 58, 64-71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989).* Thus, there will be no direct levy by a federal court on the state treasury, *i.e.*, no order that the *state* (as a *defendant* in the case) pay an attorney fee to the prevailing party. The state may have an agreement with its employees to afford them representation and to pay any judgment, including a § 1988 attorney fee award, that may be entered in the event the case is lost.

[7] Although *Silbowitz*, as a summary affirmance, does not

have the same precedential weight as a full opinion by the Supreme Court, it is entitled to some weight. *See Allen v. Wright, 468 U.S. 737, 779, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984); Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 462, 60 L. Ed. 2d 1017, 99 S. Ct. 2388 (1979).*

[8] The hourly rate for counsel appointed under *18 U.S.C. § 3006A* in this District is $ 75.00 (for both in-court and out-of-court work). This leads to a PLRA ceiling, under § 1997e(d)(3) of $ 112.50 ($ 75.00 times 150%), which is greater than the rate claimed by plaintiff's counsel ($ 110.50 per hour). Because the rate claimed by counsel is less than the PLRA ceiling, the Court has no occasion to consider the constitutionality of this provision, and the Court's holding is limited to the cap imposed by § 1997e(d)(2). This restraint is appropriate in light of the long line of Supreme Court cases noting that constitutional questions should be avoided unless absolutely necessary to a resolution of the case. *See, e.g., Rescue Army v. Municipal Court, 331 U.S. 549, 568-574, 91 L. Ed. 1666, 67 S. Ct. 1409 (1947); United States v. Raines, 362 U.S. 17, 21, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960); New York v. Ferber, 458 U.S. 747, 767-68, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982); Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435, 80 L. Ed. 2d 428, 104 S. Ct. 1883 (1984).*

99-2001, 99-2004, 99-2349

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM H. WALKER, JR.,
Plaintiff-Appellee/Cross-Appellant (99-2004),

v.

THOMAS BAIN, GUARD, ET AL.,
Defendants-Appellants (99-2001/2349)/Cross-Appellees,

THOMAS BIRKETTE, WARDEN,
Defendant,

UNITED STATES OF AMERICA,
Intervenor.

November 5, 2001, Filed

OPINION:

ORDER

The court having received a petition for rehearing en banc, and the petition haven been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.